88-2036

Supreme Court, U.S.
FILED
JUN 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1988.

CITY OF EVERETT, ET AL.,
PETITIONERS,

v.

ROSE BORDANARO, ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

IRA H. ZALEZNIK,*
LEWIN & ROSENTHAL,
The Pilot House,
Lewis Wharf,
Boston, Massachusetts 02110.
(617) 227-9400

**Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

1382

Questions Presented.

I. Whether a municipality sued under 42 U.S.C. § 1983 may be said to have established a custom of breaking down doors to effect felony arrests, in direct violation of state law, without proof of some actual high level endorsement or tolerance of such conduct.

II. Whether, under 42 U.S.C. § 1983, an alleged municipal custom of breaking down doors to effect felony arrests may be the legal cause of injuries suffered when, after the door-breaking, police officers intentionally proceeded to assault and beat the persons inside.

Whether there is a sufficient causal connection between an alleged municipal policy or custom of inadequate recruitment, training, supervision and discipline and the deliberate misconduct of police officers absent prior notice of intentional wrongdoing or proof of municipal inaction in the face of a pattern of similar acts.

III. Whether the "deliberate indifference" standard established in *Canton* v. *Harris* is met without a showing of municipal awareness that its policies of recruitment, training, supervision and discipline were creating an immediate risk that its police officers would engage in acts of physical violence against civilians.

IV. Whether Everett's Mayor and Police Chief may be held to have acted with "reckless or callous indifference to the federally protected rights of others" sufficient to support an award of punitive damages absent proof of their personal participation in the incident or prior clear warning that such deliberate misconduct was going to occur.

Table of Contents.

Introduction 1

Opinion below 2

Jurisdiction 2

Statutory provisions involved 2

Statement of the case 3

Reasons for granting the writ 9

I. This case presents the opportunity to define a "custom" upon which municipal liability may be based 11

II. The Court of Appeals' decision on the causation question is an inappropriate resolution of an important issue of federal law 16

III. The "deliberate indifference" standard requires that municipal officials ignore a specific, known risk 21

IV. Punitive damages may only be awarded upon the personal involvement of the governmental official 24

Conclusion 25

Appendix follows page 25

Table of Authorities Cited.

CASES.

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 11, 12

Bennett v. Slidell, 728 F.2d 762 (5th Cir. 1984) 15

Bigford v. Taylor, 834 F.2d 1213 (5th Cir. 1988) 19n

Cameron v. Pontiac, 813 F.2d 782 (6th Cir. 1987) 19

Canton v. Harris, U.S. , 109 S.Ct. 1197 (1989) 16, 21, 22

Colburn v. Upper Darby Township, 838 F.2d 663 (3d Cir. 1988) 20, 23

Commonwealth v. Forde, 367 Mass. 798, 329 N.E.2d 717 (1975) 13

Commonwealth v. McLeod, 394 Mass. 727, 477 N.E.2d 972, cert. denied, 474 U.S. 919 (1985) 6

Commonwealth v. Phelps, 209 Mass. 396, 95 N.E. 868 (1911) 13n

Coon v. Ledbetter, 780 F.2d 1158 (5th Cir. 1986) 18n

Eischen v. Minnehaha County, 363 N.W.2d 199 (S.D. 1985) 14

Fiacco v. Rensselaer, 783 F.2d 319 (2d Cir. 1986) 20, 23

Fundiller v. Cooper City, 777 F.2d 1436 (11th Cir. 1985) 15

Gilmere v. Atlanta, 737 F.2d 894 (11th Cir. 1984) 14

Grandstaff v. Borger, 767 F.2d 161 (5th Cir. 1985) 9n, 18n, 22n

Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981) 9n, 14

Hibma v. Odegaard, 769 F.2d 1147 (7th Cir. 1985) 20

Kibbe v. Springfield, 777 F.2d 801 (1st Cir. 1985) 16

Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983) 18n, 23

Milligan v. Newport News, 743 F.2d 227 (4th Cir. 1984) 19n

Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978) 9, 11, 23

Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987) 18, 19, 22n

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 24

Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427 (1985) 16

Parker v. District of Columbia, 850 F.2d 708 (D.C. Cir. 1988) 18, 19, 23
Patzner v. Burkett, 779 F.2d 1363 (8th Cir. 1985) 20, 23
Payton v. New York, 445 U.S. 573 (1980) 13n
Pembaur v. Cincinnati, 475 U.S. 469, 106 S.Ct. 1292 (1986) 13
Rock v. McCoy, 763 F.2d 394 (10th Cir. 1985) 9n, 18n, 23
Rymer v. Davis, 754 F.2d 198 (6th Cir. 1985) 9n, 22n, 23
Smith v. Wade, 461 U.S. 30 (1983) 24
Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987) 15
Steagald v. United States, 451 U.S. 204 (1981) 13n
St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915 (1988) 15
Strauss v. Chicago, 760 F.2d 765 (7th Cir. 1985) 19n, 23
Vippolis v. Haverstraw, 768 F.2d 40 (2d Cir. 1985) 19n
Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985) 16
Webster v. Houston, 735 F.2d 838 (5th Cir. 1984) 15
Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983) 20, 23
Wierstak v. Heffernan, 789 F.2d 968 (1st Cir. 1986) 16

STATUTES.

28 U.S.C. § 1254(1) 2
42 U.S.C. § 1983 2, 3, 6
Massachusetts General Laws
c. 44, § 8 11
c. 59, § 21C 10
c. 258, § 2 7
c. 258, § 13 24

No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1988.

CITY OF EVERETT, ET AL.,
PETITIONERS,

v.

ROSE BORDANARO, ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Introduction.

Petitioners City of Everett ("Everett"), Edward Connolly ("Connolly"), and Donald Bontempo ("Bontempo")[1] hereby

[1] Petitioners are the City of Everett, Massachusetts, Edward Connolly, the former mayor of Everett, and Donald Bontempo, the former police chief in Everett. Respondents are Rose Bordanaro, individually, and as Administratrix of the estate of Vincent Bordanaro, Alfred J. Mattuchio, Anthony Dimino,

request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered on March 30, 1989, that upheld a judgment of the District Court entered against Everett, Connolly and Bontempo, in the principal amount of three million four hundred eighty-eight thousand three hundred and fifty-six ($3,488,356) dollars, plus interest, costs, attorneys fees and punitive damages. See Appendix[2] A2.

Opinion Below.

The opinion of the United States Court of Appeals for the First Circuit, dated March 30, 1989, is not yet reported. The full text of the opinion is reproduced in Appendix A.

Jurisdiction.

The United States Court of Appeals for the First Circuit issued its decision and judgment on March 30, 1989. This petition will be filed within ninety days of this date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved.

Title 42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or

---

Nicholas Medugno, Charles Cella, Charles Tardivo, Arthur Guttadaro, Mark Eldridge, Franci Felisi, Pamela Rickards, Beverly Ferrairo, Patricia Dimino, and Helen Bozzi, all individuals and victims of the vicious attack by Everett police officers described in this petition. These persons constitute all of the parties to this proceeding in this Court.

[2] Hereafter, references to the Appendix shall be abbreviated as "App." along with the page reference.

territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case.

Petitioners Everett, Connolly and Bontempo seek review of the judgment and decision of the Court of Appeals for the First Circuit that held that they were liable under the Civil Rights Act, 42 U.S.C. § 1983, for damages resulting from the murder of Vincent Bordanaro, and the assaults on Alfred J. Mattuchio, Anthony Dimino, Nicholas Medugno, Charles Cella, Charles Tardivo, Arthur Guttadaro, Mark Eldridge, Franci Felisi, Pamela Rickards, Beverly Ferrairo, Patricia Dimino, and Helen Bozzi, committed by Everett police officers at the King Arthur Motel on July 23, 1982.[3] (Hereafter, the plaintiffs mentioned

[3] The individual Everett police officers involved in the assault, John McLeod, John Macauda, Richard Aiello, William McClusky, and Patrick McFeeley were defaulted in the District Court and they did not appeal the ensuing default judgments against them to the Court of Appeals. Also named in the District Court complaint were Robert E. Baker, a lieutenant with the Everett police department, Frederick Warford, an Everett lieutenant, and Carl Ferullo, a sergeant with the Everett force. The District Court dismissed the action against Baker and ordered a verdict directed for Warford before submission of the case to the jury. The jury found for Ferullo. No party took an appeal from the judgments entered in favor of Baker, Warford, or Ferullo, and they were not parties to the proceedings in the Court of Appeals. See App. A4.

above will be referred to as the "civilians".) The District Court assessed damages against Everett, Connolly and Bontempo in favor of the civilians in the principal amount of three million four hundred eighty-eight thousand three hundred and fifty-six ($3,488,356) dollars, plus interest, costs, attorneys fees and punitive damages. These enormous damages were levied against Everett, Connolly, and Bontempo personally although they had no contemporaneous knowledge of their subordinates' criminal conduct, and there was no evidence of prior, similar acts committed by the officers involved or other members of the police department.

The facts most favorable to the plaintiffs[4] that could have been found by the jury may be summarized as follows: In the early morning hours of July 23, 1982, John McLeod, a police officer from Everett who was off duty at the time, became involved in an altercation at a lounge at the King Arthur Motel in Chelsea, Massachusetts (App. A2). In the fight, McLeod was badly beaten and was physically thrown out of the bar. Although seriously wounded, McLeod was able to crawl to the hut of a security guard at a nearby building where he had the security guard summon the Everett police. When his on-duty colleagues, Officers Aiello, Macauda, McCluskey and McFeeley, arrived at the scene, McLeod told them what had happened, and they left to go the short distance to the motel (App. A2-A3).

When the Everett police arrived at the motel, the glass doors to the establishment were locked. The police officers then banged on the glass, and shouted threats against the patrons of the motel that they could see. Fearing for their safety, the civilians, at the suggestion of the manager, Anthony Dimino,

[4] These facts are largely those set forth in the Court of Appeals decision (App. A2-A4). Where appropriate, these facts are supplemented in this description with portions of the plaintiffs' testimony.

fled the bar and ran to Dimino's room, Room 209, and barricaded themselves inside the room (App. A3).

Before the owner, Arthur Guttadaro, or Dimino could let the police in, the police broke the glass on the door and pursued the civilians to Room 209. Both Guttadaro and Dimino followed the police to the room and even offered to let the police into Room 209 with their pass keys. Instead of accepting this offer, Macauda and Aiello grabbed Guttadaro, slammed him against the wall, and kicked him in the groin. They then held him up while McLeod proceeded to punch and kick Guttadaro, all, the while yelling at him "Who the f--- do you think you are, a--h---, f---ing with me."[5] After this attack, Guttadaro slumped to the floor. McLeod pulled Guttadaro's glasses from his face, twisted them with his hands, and then crushed them under his shoes.

After the police were finished with their attack on Guttadaro, they turned to Dimino. McLeod, pointing to Dimino, said "Break this m-----f-----'s head, too." Officers Macauda and McLeod then punched Dimino, and Aiello beat him with a baseball bat until he was barely conscious. At the conclusion of the beating, the officers grabbed Dimino, dragged him to the edge of the stairwell, and threw him down the stairs.[6]

After the beating of Guttadaro and Dimino, the officers resumed their efforts to get into Room 209. They banged the door repeatedly, armed with an assortment of weapons, including nightsticks, baseball bats, nunchucks, tire-irons and a fire axe (App. A3). Throughout the banging, they yelled obscenities at the civilians, and threatened to kill them. At one point, a hole was drilled through the door, and mace was sprayed inside. Later, Officer McClusky fired two shots with his service revolver through the door (App. A3). Eventually,

[5] Trial Transcript, Volume 3, Page 28, Testimony of Anthony Dimino.

[6] Trial Transcript, Volume 3, pp. 29-33, Testimony of Anthony Dimino.

the door gave way, and the officers entered the room and proceeded to inflict ferocious and savage beatings on the civilians inside. The police singled out the men in the room, beating them about their heads and bodies with baseball bats and other weapons After the civilians in the room were unconscious or barely conscious, the police officers went into the bathroom in Room 209 and found Mattuchio hiding there. They dragged Mattachio into the main room, and proceeded to beat him with tire irons and baseball bats. Throughout the beating, the police would ask Mattachio if he had "had enough." Mattuchio responded that he had "had enough" and that the police "had won." Rather than stopping the beating, the police told Mattachio that he had not "had enough" and they resumed their pounding. During the course of these beatings, McLeod came into Room 209 with a baseball bat. He proceeded to go to each man in the room and clubbed them over the head. While striking the civilians, McLeod said, "Remember my name, John McLeod. Don't forget it." (App. A4.)

Most of the persons in Room 209 sustained serious injuries from the beatings. Vincent Bordanaro died as a result of repeated blows to his head (App. A4). After the incident, Officers McLeod, Aiello, and Macauda were indicted on charges of murder, assault and battery, and violation of civil rights of the civilians. After a lengthy state court trial, these officers were convicted of murder in the death of Vincent Bordanaro and various lesser offenses arising from their conduct. See *Commonwealth* v. *McLeod*, 394 Mass. 727, 477 N.E.2d 972, *cert. denied*, 474 U.S. 919 (1985).

After the end of the criminal proceedings, the civilians commenced this action in the United States District Court for the District of Massachusetts, on numerous federal and state law grounds. As the case was eventually submitted to the jury, the civilians relied on two theories of liability under the civil rights act, 42 U.S.C. § 1983, and liability against Everett under the

Massachusetts Tort Claims Act, M.G.L. c. 258, §§ 2 *et seq.* The two Federal claims were that Everett maintained an unconstitutional custom of breaking down doors to effect felony arrests (which custom caused the harm to the civilians), and that Everett's grossly inadequate policies or customs in recruitment, training, supervision and discipline of its police officers caused the violations in this case. The jury found for the civilians on both theories, and multi-million dollar damage judgments were entered against Everett, Connolly and Bontempo. After entry of judgment, Everett, Connolly and Bontempo duly appealed the award to the Court of Appeals for the First Circuit.

On appeal, Everett, Connolly, and Bontempo argued that there were numerous errors committed in the District Court. First, they argued that the evidence was insufficient to establish that there was an unconstitutional custom maintained in Everett of breaking down doors by police. Even if one were to assume the existence of such a custom, it could only be the cause of the civilians' injuries in a "but-for" sense, an inadequate causal link for civil rights liability. Similarly, as to the alleged deficiencies in recruitment, training, supervision and discipline, Everett, Connolly and Bontempo asserted that there was an inadequate causal connection between such problems and the deliberate, criminal misconduct of the police officers at the motel. The civilians introduced no evidence of any other like incident, and there was no other evidence, expert or otherwise, that would establish the requisite causal connection. As for the award of punitive damages, Connolly and Bontempo argued that there was an insufficient nexus between their personal conduct and the officers' behavior to justify an award of punitive damages. Finally, Everett, Connolly and Bontempo argued that the jury instructions on the degree of fault required and the element of causation were inadequate to instruct the jury on the correct legal standards to be applied in the deliberations.

After hearing, the Court of Appeals rejected these claims. The court concluded that the testimony of Sgt. Ferullo, along with the inferences that could be drawn from the incident itself, were sufficient to prove the existence of the unconstitutional custom. This custom, the panel concluded, was the legal cause of the harm because had this custom not existed, the police never would have gained access to the room. An enforced cooling off period would thereby have prevented the violence that ensued (App. A12-A13). As for the policy or custom of inadequate recruitment, training, supervision and discipline, the court held that the direct evidence of such inadequacies, combined with the inferences that could be drawn from the incident itself, established the requisite causal connection. This evidence sufficed to prove causation since a "sufficiently supervised, properly recruited, trained and disciplined group of officers would not have acted so far below the level of accepted police behavior." (App. A22.) Concerning the challenge to the jury instructions, the court concluded that the language adequately covered the legal standards to be applied by the jury. Accordingly, the court affirmed the judgment for the civilians.

The Court of Appeals' decision, in effect, permitted municipal and official liability under circumstances that amount to little more than *respondeat superior* responsibility. It held Everett liable without proof of the existence of an actionable custom, much less any official knowledge or sanction of it. In addition, the court used standards of fault and causation that permitted recovery without any evidence that officials knew that their training and supervisory policies were creating an immediate risk that police officers would engage in barbaric, violent attacks on civilians. There was no evidence that the city was on notice, through direct evidence, or a pattern of similar misconduct, that the violence at the motel was likely to occur. Finally, it permitted the recovery of punitive damages

against the mayor and the police chief without proof of any such warning or personal participation on their parts to warrant a punitive award. Whether municipal and official liability under the civil rights act may be assessed in these circumstances is at the heart of the issues presented to this Court by this petition.

Reasons for Granting the Writ.

In a case, such as this one, where police officers, supposedly sworn to uphold the law, engage in egregious, deliberate misconduct, the temptation is strong to punish everyone with any connection to the wrongdoers, particularly anyone perceived to have a "deep pocket." The Court of Appeals' decision in this matter succumbed to this urge.[7] See App. A36. In doing so, however, the Court of Appeals interpreted the requirements of custom, causation, and fault so broadly that, if sustained, it would, in short order, overcome the carefully drawn lines for municipal liability developed in the cases since *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978). In the short term, the result would be financial disaster for the City of Everett. Essential services would necessarily be cut, or eliminated entirely, to pay the multi-million dollar judgment entered in this case. Over time, should the Court of Appeals' ruling be sustained, all governmental entities in the First Circuit will face the assault against the public treasury that is sanc-

[7] The Court of Appeals' decision is not unique. Other Courts have been willing to stretch the strict rules on municipal liability when dealing with extreme cases of police misconduct. See, e.g., *Grandstaff* v. *Borger*, 767 F.2d 161 (5th Cir. 1985); *Rymer* v. *Davis*, 754 F.2d 198 (6th Cir. 1985); *Herrera* v. *Valentine*, 653 F.2d 1220 (8th Cir. 1981) and *Rock* v. *McCoy*, 763 F.2d 394 (10th Cir. 1985). Municipal liability, however, should depend on municipal fault, not the outrageousness of police misconduct. This Court could use this case to deliver this lesson forcefully to all of the circuits, as it is unlikely that there could be any match in the future for the police atrocity committed at the King Arthur Motel.

tioned in the Court of Appeals' approach. To protect Everett and other governmental entities from unprecedented financial liability, this Court should grant certiorari to set forth the standards of causation, fault, and custom required for municipal and official liability in a case where subordinates engage in deliberate misconduct.

One cannot overstate the impact of this judgment upon the government of Everett and its taxpayers. Everett is not a large city, and its entire annual budget amounts to less than forty-nine million ($49,000,000) dollars.[8] Of this amount, the school department receives almost sixteen million dollars to run the school system. Over sixteen million dollars is needed to pay fixed costs, such as interest payments on debt, pensions, health insurance, and other similar annual obligations. Everett spends the remainder of the budget on City departments, including three million six hundred thousand on the police department, and three million eight hundred thousand dollars on the fire department. Under Massachusetts law, Everett could not simply raise taxes to pay the judgment in this case without a referendum vote of the taxpayers. See M.G.L. c. 59, § 21C. Neither could it plan for a long-term repayment of the debt without specific legislative authorization for these arrange-

[8] These facts were submitted to the Court of Appeals in the form of an affidavit of Mayor John R. McCarthy in support of Everett's motion for a stay pending appeal utilizing substitute collateral. After the filing of the appeal from the District Court, Everett could not secure a supersedeas bond, due to the insurance market in Massachusetts and the size of the judgment. Accordingly, Everett sought the entry of a unsecured stay pending appeal. After the Court of Appeals denied this request, Everett sought a stay utilizing substitute collateral. Eventually, the Court of Appeals ordered that the judgment of the District Court be stayed upon posting of six million ($6,000,000) dollars in security. Everett posted this security in the form of a five and one-half million ($5,500,000) dollar letter of credit from the Shawmut Bank of Boston, and five hundred thousand ($500,000) dollars in insurance proceeds deposited with the District Court. By order dated April 25, 1989, the Court of Appeals continued this stay in effect pending disposition of this petition, provided that this security remained in place. Everett has complied with this order.

ments. See M.G.L. c. 44, § 8. In short, if Everett voters or State Legislators do not cooperate, Everett will be forced to take over ten percent of its budget to pay this judgment. Even if approval is secured for a tax increase, long-term payment or some combination of the two, Everett will be faced with a huge payment within the confines of its financial resources.[9] In this era of shrinking governmental resources, such a financial burden should not be lightly imposed upon a local government.

The Court of Appeals found against Everett and its officials based upon standards of custom, causation, and fault so broad as to render Everett almost an insurer of the acts of its employees. These standards conflict with the spirit, if not the letter, of decisions of this Court, and run counter to decisions of the courts of appeals for other circuits. Accordingly, this case is an appropriate one for the exercise of this Court's certiorari jurisdiction regarding the standards of custom, causation, and fault, as discussed below.

I. This Case Presents the Opportunity to Define a "Custom" Upon Which Municipal Liability May Be Based.

This Court has yet to address squarely the issue of what constitutes a municipal custom for purposes of assessing liability under 42 U.S.C. § 1983. Although this Court has not elaborated on the standard, prior cases have defined custom as practices that are "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Monell, supra*, 436 U.S. at 691, quoting *Adickes* v. *S.H. Kress & Co.*,

[9] Due to the need to reassess attorneys fees, the final amount of the judgment is uncertain. However, in arguments relating to the stay, the civilians asserted that the six million dollars in security was inadequate to secure the entire award. See note 8, *supra*.

398 U.S. 144, 169-170 (1970). Left unanswered are questions as to the testimony required to prove the existence and permanence of a custom, what degree of official involvement must exist before the custom may be attributed to the municipality, and the relationship between a custom and state law. This case provides an appropriate vehicle to answer these questions.

The Court of Appeals relied solely on the testimony of Sgt. Ferullo and inferences drawn from the event itself to establish the existence of the custom. The record is barren of any other evidence, such as other similar conduct, that would support the existence of the custom. This analysis gave short shrift to the "well settled" and "force of law" aspects of the definition of custom.

As is clear from the testimony of Sgt. Ferullo reproduced in the appendix,[10] Ferullo was not testifying about his understanding of any particular practice in Everett. Rather, he was attempting to justify his decision to leave the scene before the outbreak of violence. His excuse was that he merely witnessed efforts to break down a door under circumstances that he believed made the action lawful in Massachusetts (App. A59, A61-A62). Neither did Ferullo distinguish between door breakdowns that would be lawful under current standards and those that would be unlawful. Based upon Ferullo's testimony, every break that he may have witnessed or participated in, prior to the King Arthur incident, could have been conducted based on a warrant, or because of exigent circumstances. There is simply no way, using Ferullo's testimony, to distinguish between *lawful* door breakdowns and unlawful ones.

Even if one were to assume that every door breaking that Ferullo described was unlawful under current standards, the

[10] See App. A55-A62. These excerpts from Ferullo's testimony constitute virtually the *entire* record relied upon to establish custom in the Court of Appeals' decision. While there may be one or two other references in his testimony to breaking down doors, any such references would not add anything to the testimony reproduced in the Appendix.

evidence would still be insufficient to prove an actionable custom. Although Ferullo testified to the contrary (see App. A59, A61), the law in Massachusetts at the time of the King Arthur incident expressly prohibited breaking down a door to effect a felony arrest.[11] *Commonwealth* v. *Forde*, 367 Mass. 798, 804, 329 N.E.2d 717, 721 (1975). Therefore, to establish an actionable custom, the civilians would have had to present evidence that, notwithstanding the change in the law of Massachusetts, Everett *continued* to sanction the breaking down of a door to effect a felony arrest. One lower level employee's mistaken view of the law is plainly inadequate. As Mr. Justice White stated, concurring in *Pembaur* v. *Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 1301-1302 (1986):

> Local law enforcement officers are expected to obey the law and ordinarily swear to do so when they take office. Where the controlling law places limits on their authority, they cannot be said to have the authority to make contrary policy. . .. If deliberate or mistaken acts like this, admittedly contrary to local law, expose the county to liability, it must be on the basis of *respondeat superior* and not because the officers' acts represents local policy.

---

[11] Before 1975, Massachusetts had followed the majority of jurisdictions that permitted such conduct. See *Commonwealth* v. *Phelps*, 209 Mass. 396, 407-408, 95 N.E. 868 (1911) ("An officer who has the right to arrest without a warrant because he suspects on reasonable grounds that the defendant has committed a felony, has a right to break open doors."). In 1975, however, the Massachusetts Supreme Judicial Court, correctly predicting the outcome of future cases in this Court, ruled that breaking down a door to effect a felony arrest was an unreasonable seizure under the Constitution and prohibited the practice. See *Commonwealth* v. *Forde*, 367 Mass. 798, 329 N.E.2d 717 (1975). See also *Payton* v. *New York*, 445 U.S. 573 (1980) and *Steagald* v. *United States*, 451 U.S. 204 (1981). Therefore, it is not surprising that Ferullo may have been to twenty or thirty (App. A59) or fifty or sixty (App. A56-A57) door breaks in the past, as this conduct was lawful in Massachusetts prior to 1975.

Similar problems beset the Court of Appeals' efforts to attribute this unconstitutional custom to Everett (App. A10-A12). As the court acknowledged, there was no direct evidence that Bontempo had any actual knowledge of this "custom" (App. A10). Instead, the court concluded that Bontempo had "constructive knowledge" of the custom through his extensive report review process[12] (App. A10-A11). With Bontempo's failure to "eradicate this facially unconstitutional practice from the police department," this custom, according to the Court of Appeals, could be fairly attributed to Everett (App. A11). Thus, Bontempo's failure to eliminate something that he may have known nothing about, assuming it even existed, subjected the City (along with Bontempo personally) to liability. This analysis drains the custom requirement of any meaning, creating liability that is, at best, vicarious.

Other circuits, when confronted with these questions, have either imposed more stringent standards, or required a higher level of proof. For example, the Eleventh Circuit Court of Appeals in *Gilmere* v. *Atlanta*, 737 F.2d 894, 902 (11th Cir. 1984) required that a policymaker create or establish a municipal custom before liability could be imposed. The *Gilmere* court therefore upheld the dismissal of a case in which there was no evidence introduced that "any policy-setting official had approved of, much less encouraged," a custom of the use of excessive force in making arrests. *Id.* at 902. Accord *Eischen* v. *Minnehaha County*, 363 N.W.2d 199, 203 (S.D. 1985); *Herrera* v. *Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981)

[12] It is ironic that this extensive report review process that the Court of Appeals relied on to impute knowledge to Bontempo is the same supervisory procedure that the jury must have rejected, in order to find that the supervision in the police department constituted deliberate indifference to the constitutional rights of Everett citizens. See Part III, *infra*. Although the facts must be accepted that are most favorable to the winner after a jury verdict, it seems fundamentally unfair to adopt testimony to support one theory of liability, while rejecting it in an equally applicable context.

(municipality's continuing failure to remedy *known* unconstitutional conduct is type of custom actionable under the civil rights act). *Fundiller* v. *Cooper City*, 777 F.2d 1436, 1442 (11th Cir. 1985) (only policy makers may create a custom). See also *Webster* v. *Houston*, 735 F.2d 838 (5th Cir. 1984) (constructive knowledge shown where "the violations were so persistent and widespread that they were the subject of prolonged public discussion or of a high degree of publicity"). Accord *Bennett* v. *Slidell*, 728 F.2d 762, 768 (5th Cir. 1984).

Only the Fourth Circuit, in *Spell* v. *McDaniel*, 824 F.2d 1380 (4th Cir. 1987) could be said to have applied the same standards articulated by the First Circuit. See *Id.* at 1387-1391. Yet the *Spell* court required detailed proof from civilians, members of the department, former members of the department, and even the former legal officer for the department that supervisors knew of widespread misconduct before imposing liability. See *Id.* at 1394-1395. This evidence justified the finding that the chief had expressly condoned his subordinate's offensive conduct. *Id.* at 1395.

In short, there is a clear division of authority about the standards to be applied, and the quantum of proof required, in order to establish liability under the custom element of *Monell*. Since this Court has recently rendered proof of official policy somewhat more difficult, it can be expected that plaintiffs will now turn to the custom element to attempt to establish municipal liability. See *St. Louis* v. *Praprotnik*, 485 U.S. 112, 108 S.Ct. 915 (1988). Certiorari should be granted in this case to define the standards of proof required in order to establish municipal liability on the basis of a custom or practice.

II. The Court of Appeals' Decision on the Causation Question Is An Inappropriate Resolution of An Important Issue of Federal Law.

As this Court noted in *Canton* v. *Harris*, U.S. , 109 S.Ct. 1197, 1203 (1989), the first inquiry in a municipal liability case is whether there is a "direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." This analysis encompasses at least two distinct elements: first, that actions under review must be the actions of the city; and second, the actions must actually cause the harm to the plaintiffs. See, e.g., *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 2439 (1985) (Brennan, J., concurring). *Canton* primarily addressed an aspect of the first element of causation under Section 1983, as to what degree of "fault" must be exhibited by the municipality in order for the actions to be fairly attributable to it. *Canton* left open the second aspect of the causation requirement, a principal focus of this case, on how "direct" the causal link must be between the policy or custom and the constitutional violation.

While the issues may be easy to identify, deciding how "direct" the cause must be has led to sharp divisions among the Circuits. The First Circuit has consistently taken a broad approach, allowing recovery if the policy or custom facilitated the unconstitutional conduct (App. A12-A13, A22). See also *Kibbe* v. *Springfield*, 777 F.2d 801 (1st Cir. 1985), *cert. dismissed as improvidently granted*, 480 U.S. 257 (1987); *Wierstak* v. *Heffernan*, 789 F.2d 968 (1st Cir. 1986); and *Voutour* v. *Vitale*, 761 F.2d 812 (1st Cir. 1985). In this case, the custom of breaking down doors was deemed to be the cause of the ultimate harm to the civilians because it enabled the police to gain access to the civilians. (See App. A12-A13.) Similarly, the inadequacies in Everett's administration of its police department caused the harm since "a sufficiently super-

vised, properly recruited, trained and disciplined group of officers would not have acted so far below the level of accepted police behavior." (App. A22.)

The difficulty with the First Circuit approach is that there are intermediate steps that must be taken to get from the policy or custom to the actual injury. For example, the custom of breaking down doors in no way compelled the police to batter the civilians once they were inside. Similarly, inadequate recruitment, training, supervision, and discipline has little, if any, impact upon police officers who choose to engage in conduct that anyone would know is unlawful.[13] The First Circuit's view of causation, however, permits recovery since the policy or custom facilitated the ultimate harm to the civilians.[14]

The jury instructions on causation mirrored the approach of the Court of Appeals.[15] In his instructions, the trial judge

[13] Although the Court of Appeals did not do so, proper analysis of causation requires consideration of inadequate recruitment, improper training, or lax supervision and discipline as separate bases for liability. Considering each separately, the evidence cited by the Court of Appeals in Part III(B) of its opinion falls far short of that required to establish causation. For example, inadequate background checks and the lack of psychological testing (App. A17) is immaterial unless there is some evidence that the background checks and psychological testing would have disclosed information that would have prevented the harm. Similarly, notwithstanding the lack of training on more modern rules of the use of force, hot pursuit, and search and seizure, there was no evidence to establish that the police academy training that all of the officers received was inadequate to teach them that attacking civilians and beating them with baseball bats was inappropriate behavior for police officers. In short, the Court of Appeals jumped the intermediate steps from policy or custom to injury through sheer speculation.

[14] Although the Court of Appeals acknowledged that "mere but/for" causation was insufficient to meet the applicable standard, the analysis closely resembles "but for" reasoning (App. A21). "But for" the custom of breaking down doors, the police officers would not have been able to commit their murderous acts. "But for" the inadequate recruitment, training, supervision and discipline, the police officers would not have been in the position to batter the civilians. Although both policies and customs can be viewed as contributing elements to the ultimate harm, in no way can they transform the acts of the police into conduct by the city.

[15] The entire substantive portion of the judge's charge is reproduced in Appendix C (App. A39-A54). The only portions of the charge omitted from the

repeatedly told the jury that the policy or custom only had to be *a cause* of the harm (App. A44, A45). On other occasions, the trial judge instructed the jury that they had to find "*an* affirmative link" between the policy or custom and the harm. (See App. A45, A46, A47, A53.) In one instance, the trial judge stated that the policy had to be "*a* moving force of the violation." (App. A46.) Under this standard, the policy or custom did not have to be the primary cause or the direct cause of the harm. Instead, liability could be imposed if the policy or custom merely formed a link in the chain that led to the constitutional violation.[16]

Other circuits have followed the approach of the First Circuit.[17] For example, the District of Columbia Circuit, in *Morgan* v. *District of Columbia*, 824 F.2d 1049 (D.C. Cir. 1987) and *Parker* v. *District of Columbia*, 850 F.2d 708 (D.C. Cir. 1988) permitted recovery based upon a standard that the District's conduct was "a substantial factor in bringing about harm."

Appendix concerned standard instructions on the burden of proof, drawing inferences, direct and circumstantial evidence, and, after going through the list of witnesses, the nature of jury deliberations.

[16] The trial judge expressly charged the jury to this effect when he was comparing the causation requirement under the civil rights act to the comparable state law standard. As the trial judge stated (App. A53): "And you see here that I have said 'directly caused' in this [state law] question and just 'caused' in the other [federal] questions. The causal connection, I suggest to you under [M.G.L.] Chapter 258, has to be more direct or proximate, is the lawyers' phrase for it, than the causal connection under 1983, which calls for an affirmative link. Direct or proximate cause means that there was a direct line between what was done and the harm suffered . . . ."

[17] Aside from the District of Columbia Circuit, the Tenth Circuit, in *Rock* v. *McCoy*, 763 F.2d 394 (10th Cir. 1985), has taken a relaxed view of the causation requirement. In *Rock*, a victim of a police beating was permitted to recover upon a showing of direct evidence of inadequate training, along with the inferences drawn from the incident itself. Also taking this view was the Fifth Circuit in *Grandstaff* v. *Borger*, 767 F.2d 161 (5th Cir. 1985). The *Grandstaff* opinion, however, may or may not, represent the consensus of opinion in the Fifth Circuit. See, e.g., *Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983) and *Coon* v. *Ledbetter*, 780 F.2d 1158, 1161 (5th Cir. 1986) (*Grandstaff* opinion should be confined to its extraordinary facts).

See *Parker, supra*, 850 F.2d at 714; *Morgan, supra*, 824 F.2d at 1062-1063. In neither *Parker* nor *Morgan* was the policy or custom the immediate cause of the harm. Rather, in *Parker* confusion about the extrajurisdictional authority of District police led to a chain of events that culminated in the shooting of the plaintiff. *Parker, supra* at 714. In *Morgan*, the court considered prison overcrowding to be an underlying condition that led to the fight between inmates that injured the plaintiff. *Morgan, supra* at 1063. In both cases, the court found liability based upon a policy or custom that started a chain of events that led to the ultimate harm.[18]

At the opposite end of the spectrum are the circuits that strictly enforce the causation element.[19] For example, the Sixth Circuit, in *Cameron* v. *Pontiac*, 813 F.2d 782 (6th Cir. 1987), refused to hold a municipality responsible for the death of a burglary suspect, killed when he was struck by a car while fleeing from the police. Even assuming that the conduct of the police in attempting to apprehend the suspect transgressed constitutional standards, the court was unwilling to conclude that the police conduct was the legal cause of the harm. *Id.* at 785-786. Under the First Circuit's approach, the court would have considered the police misconduct to be the cause of the harm since the actions of the police set the chain of events in motion that culminated in the killing of the suspect.

---

[18] This causation analysis was not adopted without dissent. See *Morgan* v. *District of Columbia*, 824 F.2d at 1068 (Starr, J., dissenting) and *Parker* v. *District of Columbia*, 850 F.2d at 716 (Williams, J., dissenting). Indeed, Judge Williams' cogent dissent criticized the reasoning of the majority as it "out-*Palsgrafs Palsgraf*. On such a theory, the want of a nail was 'the moving force' behind the kingdom's loss." *Id.* at 725.

[19] In addition to the Sixth and Seventh Circuits, discussed below, the Second and Fourth Circuits also apply the more strict causation requirement. See, e.g., *Vippolis* v. *Haverstraw*, 768 F.2d 40 (2d Cir. 1985); *Milligan* v. *Newport News*, 743 F.2d 227 (4th Cir. 1984). See also *Bigford* v. *Taylor*, 834 F.2d 1213, 1220 (5th Cir. 1988); *Strauss* v. *Chicago*, 760 F.2d 765 (7th Cir. 1985).

The Seventh Circuit is allied with the Sixth Circuit, as shown in *Hibma* v. *Odegaard*, 769 F.2d 1147 (7th Cir. 1985). In *Hibma*, the Court of Appeals declined to hold a deputy responsible for the rape of the plaintiff in prison, even though the plaintiff was in prison as a result of being wrongfully framed by the official. The court concluded that the chain of events was too attenuated to permit official liability for the rape.

In the absence of a direct causal link between the policy or custom and the injury, most circuits have required proof of a pattern of prior, similar acts in order to establish the requisite causal connection. See *Fiacco* v. *Rensselaer*, 783 F.2d 319, 327 (2d Cir. 1986); *Colburn* v. *Upper Darby Township*, 838 F.2d 663, 672-673 (3d Cir. 1988); *Wellington* v. *Daniels*, 717 F.2d 932, 936 (4th Cir. 1983); *Patzner* v. *Burkett*, 779 F.2d 1363, 1367 (8th Cir. 1985). Without such proof, there is no evidence upon which to base a finding that the policy or custom "caused" the police misconduct. Without evidence, resolving the causation issue amounts to sheer speculation on the part of the factfinder.[20] Proof of a pattern of prior similar acts, as most circuits have held, enables the factfinder to base the causal connection on some concrete evidence.

This conflict over standards of causation raises an important issue of federal law with enormous consequences for municipalities around the country. If a lenient standard of causation embodied in the First Circuit's ruling is to become law, cities and towns will be subjected to unprecedented financial liability. Such liability will be imposed even though the connection between municipal wrongdoing and the ultimate

---

[20] Such speculation is exactly what occurred in this case. As the trial judge acknowledged in his instructions, there was no evidence to support a finding on the causation issue (App. A49). Rather, he directed the jury to make a finding, based upon their own experiences, on whether the incident would have occurred if the city had met the appropriate standards of behavior (App. A49). On this record, this process involved pure speculation.

harm is speculative. This Court should therefore grant certiorari to protect local treasuries and to establish that the First Circuit's rule is entirely too broad to serve as a basis for municipal liability.

III. The "Deliberate Indifference" Standard Requires That Municipal Officials Ignore a Specific, Known Risk.

Closely allied with the question of causation is the degree of fault that policy making officials must exhibit in order to warrant liability. *Canton* v. *Harris*, U.S. 109 S.Ct. 1197 (1989), decided this term, held that liability may be established only where a city's failure to train amounts to "deliberate indifference to the constitutional rights of its inhabitants." *Id.* at 1206. Left open in this formulation is the question of how close the connection must be between the risk of harm created by the failure to train, and the ultimate injury. In other words, for a municipality to be "deliberately indifferent," must it have notice that its failure to train is creating the very risk of harm that ultimately injures the plaintiff, or is it sufficient that the inadequate training create a more general risk of constitutional violations? Although the First Circuit adopted the latter approach, it would seem that the spirit of *Canton* v. *Harris* would require adoption of the former rule.

The First Circuit clearly adopted a broad rule, permitting liability upon a showing that a violation of constitutional magnitude was bound to occur. (See, e.g., App. A21: "The 'do nothing policy' of the Mayor and the Chief exposed the citizens of Everett to imminent police misconduct, and was attributable to the municipality".) In particular, the Court of Appeals pointed to the testimony of Lt. Stewart that he had told Mayor Connolly and Chief Bontempo that "something bad" would

happen if the police did not receive more training (App. A18, A24). Using the warning, the Court of Appeals developed the following equation: the mayor and the chief maintained a "badly" operated police department; Lt. Stewart specifically warned the mayor and the chief that "something bad" would happen if they did not provide more training; therefore, when "something bad" happened at the King Arthur Motel, the mayor and the chief were responsible.[21]

The trial judge's jury instructions tracked this approach. The trial judge instructed the jury that if officials acted with gross negligence amounting to deliberate indifference, and this attitude had a causal relationship with the harm that was suffered, then the municipality would be liable[22] (App. A47). He then elaborated on this standard as "somebody just not giving a damn, somebody putting convenience, self-protection, even budgets ahead of the duty imposed to protect and preserve the citizens, the community. . ." (App. A26, A48.) Under this formulation, there was no acknowledgement that the "deliberate indifference" had to create a known risk of specific harm.

To attain the degree of fault implicit in the "deliberate indifference" standard, however, the municipality must have notice that its actions are going to result in specific constitutional violations. See *Canton, supra* at 1208-1209 (O'Connor, J., concurring in part, dissenting in part). Thus, it is not enough that Everett should have known that its policies of recruitment,

---

[21] The First Circuit is not alone in relying on this formula. The Fifth, Sixth, and District of Columbia Circuits have also utilized this approach. See e.g. *Rymer* v. *Davis*, 754 F.2d 198 (6th Cir. 1985); *Grandstaff* v. *Borger*, 767 F.2d 161 (5th Cir. 1985); and *Morgan* v. *District of Columbia*, 824 F.2d 1049 (D.C. Cir. 1987).

[22] At trial, and in the Court of Appeals, Everett objected to the instruction insofar as it left open the possibility that Everett could be held liable on a theory of heightened negligence, as opposed to conscious conduct (App. A24-A25). The correctness of the trial judge's instruction is a question fairly subsumed by Question III presented in this petition.

training, supervision and discipline would lead to "something bad." Rather, Everett should only be held liable if it knew or should have known that its policies would lead its police force to engage in deliberate acts of violence against civilians. Only then can it be said that the "execution of the government's policy or custom . . . inflicts the injury." *Monell, supra,* 436 U.S. at 694.

This reasoning has prompted most of the circuits to require a pattern of prior, similar misconduct in order to meet the "deliberate indifference" standard. See *Fiacco* v. *Rensselaer*, 783 F.2d 319, 327 (2d Cir. 1986); *Colburn* v. *Upper Darby Township*, 838 F.2d 663, 672-673 (3d Cir. 1988); *Wellington* v. *Daniels*, 717 F.2d 932, 936 (4th Cir. 1983); *Languirand* v. *Hayden*, 717 F.2d 220, 227-228 (5th Cir. 1983); *Strauss* v. *Chicago*, 760 F.2d 765, 767-768 (7th Cir. 1985); *Patzner* v. *Burkett*, 779 F.2d 1363, 1367 (8th Cir. 1985); Contra, *Rymer* v. *Davis*, 754 F.2d 198, 200-201 (6th Cir. 1985); *Rock* v. *McCoy*, 763 F.2d 394, 397-398 (10th Cir. 1985); *Parker* v. *District of Columbia*, 850 F.2d 708, 712-713 (D.C.Cir. 1988). Only after a pattern of misconduct can it be said that a municipality had notice of the problem and deliberately disregarded the risk.

The First Circuit's broadening of this requirement unduly widens the scope of municipal liability. Under the First Circuit's approach, a municipality will be held liable for every injury inflicted after any warning that "something bad" may happen. If this ruling stands, municipalities will become, in effect, insurers against all harm from their employees. This Court should therefore grant certiorari to restrict municipal liability to harm resulting from those risks a municipality wrongfully chooses to take.

IV. Punitive Damages May Only Be Awarded Based Upon the Personal Involvement of the Governmental Official.

The Court of Appeals upheld the award of punitive damages based largely on knowledge of wrongdoing that it imputed to the mayor and the chief (App. A23-A24). This approach eviscerates the standard set forth in *Smith* v. *Wade*, 461 U.S. 30, 56 (1983) and raises serious issues regarding the personal liability of public officers.

Implicit in *Smith* was the notion that an official was subject to punitive damages *for his own conduct*, if committed with "evil motive or intent, or . . . reckless or callous indifference to the federally protected rights of others." *Id.* at 56. *Smith* involved review of the actions of a prison guard who, by his reckless indifference, subjected a prisoner to an assault from other inmates. The constitutional harm, therefore, could be traced to the guard's own conduct.

Here, the mayor and the chief were held liable for punitive damages based upon the assumptions that they should have known of the custom of breaking down doors and the inadequacies of the administration of the police department. There is a basic difference, though, between imputing such knowledge for purposes of determining liability and using it as a basis for assessing punitive damages. There is, quite simply, too attenuated a link between the actions of the mayor and the police chief and the ultimate harm to serve as a basis for the award of punitive damages.

In its present form, the Court of Appeals' ruling exposes municipalities and its officials to unlimited financial liability. In jurisdictions that have broad rights of indemnification (see M.G.L. c. 258, § 13), the decision invites jury nullification of *Newport* v. *Fact Concerts*, Inc., 453 U.S. 247 (1981). In jurisdictions with more limited indemnification rights, the rul-

ing would discourage any thoughtful person from engaging in public service. To limit this liability and to limit the award of punitive damages to punish persons for their actual conduct, this Court should grant certiorari to review the decision of the Court of Appeals.

Conclusion.

The police misconduct committed in the early morning hours of July 23, 1982 was shocking, outrageous, and an affront to all citizens of Everett. Judicial dismay with the incident, and the desire to punish the participants, however, is no justification for distorting the rules that limit the liability of cities and towns and their officials. To protect the public treasuries, and the treasury of the City of Everett, from unprecedented financial loss, this Court should grant certiorari to review the decision and judgment of the Court of Appeals for the First Circuit.

Respectfully submitted,

IRA H. ZALEZNIK,*
LEWIN & ROSENTHAL,
The Pilot House,
Lewis Wharf,
Boston, Massachusetts 02110.
(617) 227-9400

**Counsel of Record*

Appendix Table of Contents.

Appendix A

Opinion of the United States Court of Appeals for the First Circuit dated March 30, 1989 A1

Appendix B

Judgment of the United States Court of Appeals for the First Circuit entered March 30, 1989 A38

Appendix C

Excerpt from Charge to the Jury by Walter J. Skinner, U.S.D.J., October 28, 1987, Volume 16, pp. 11-31 A39

Appendix D

Excerpts from Testimony of Defendant Carl A. Ferullo, Everett Police Department A55

APPENDIX A

United States Court of Appeals
For The First Circuit

No. 88-1563

ROSE BORDANARO, ET AL.,
Plaintiffs-Appellees,

v.

JOHN McLEOD, ET AL.,
Defendants,

CITY OF EVERETT, EDWARD CONNOLLY,
AND DONALD BONTEMPO,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U.S. District Judge*]

Before
Bownes and Breyer, *Circuit Judges*,
and Caffrey,* *Senior District Judge*.

Ira H. Zaleznik with whom *Lewin & Rosenthal* was on brief for appellants.

Juliane Balliro with whom *Joseph J. Balliro, Balliro, Mondano & Balliro, Martin K. Leppo, Anthony Traini, Leppo & Traini, Frank Mondano* and *J. James Balliro, Jr.*, were on brief for appellees.

MARCH 30, 1989

* Of the District of Massachusetts, sitting by designation.

BOWNES, *Circuit Judge*. This appeal arises out of brutal beatings that the plaintiffs-appellees received at the hands of Everett, Massachusetts police officers. Those injured and the estate of a person killed in the attack were awarded substantial verdicts[1] in their actions based upon 42 U.S.C. § 1983 and the Massachusetts Tort Claims Act. The defendants-appellants — the City of Everett, its Mayor, and its Chief of Police — appeal, alleging numerous errors of law and mistakes of fact.

We affirm the verdicts but remand for a reassessment of attorneys' fees.

I. THE FACTS.

We state the facts, as we must, in the light most favorable to the plaintiffs. *See Robinson* v. *Watts Detective Agency*, 685 F.2d 729, 732 (1st Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). In the early morning hours of July 23, 1982, Everett policeman, John McLeod, who was off duty, escorted Beverly Ferrairo to a bar located inside the King Arthur Motel in Chelsea, Massachusetts. An altercation soon began between McLeod and plaintiff Alfred "Da" Mattuchio. As McLeod was about to land the first punch against Mattuchio, Charles Dimino intervened and fisticuffs ensued between Dimino and McLeod. Dimino proved the better pugilist and McLeod, beaten and bloody, was thrown out of the bar.

McLeod then went to a nearby security hut and had the attendant call the Everett Police Department for reinforcements. At the Everett station house, Lieutenant Baker and Sergeant Ferullo listened on the radio as the entire night watch of the Everett Police Department — five officers — reported

[1] The total award was approximately $3,488,356 in compensatory damages and $819,983 in punitive damages.

that they were en route to aid McLeod. The Chelsea Police Department also responded and sent officers to the scene.

When theses officers arrived, McLeod took a set of nunchaku[2] from the trunk of one of the cruisers and joined the other officers as they moved toward the King Arthur Motel in force.

As the police approached the locked glass doors of the motel, the plaintiffs, all patrons of the bar, viewed them with apprehension. The officers shouted threats to the plaintiffs and demanded entry. Before the manager could open the doors, the police shattered the glass with their nightsticks. Fearing for the safety of the plaintiffs, the manager sent them upstairs to Room 209, while he went to unlock the doors. Once the doors had been opened, the police rushed into the motel and mounted the stairs in pursuit of the plaintiffs.

The owner of the King Arthur Motel, Arthur Guttardaro, and the manager followed the police up to Room 209. The police began banging on the door with their nightsticks, threatening to kill the occupants of the room. Guttardaro and the manager offered to open the door with a pass key. Instead of accepting their offer, Officers McLeod, Macauda and Aiello assaulted and beat Guttardaro and the manager. Both men managed to draw themselves to safety despite suffering injuries.

The police officers were armed with nightsticks, clubs, bats, tire-irons, and a fire axe, in addition to their service revolvers. They banged repeatedly on the door, demanding entry and continuing to threaten the plaintiffs. A hole was hastily drilled in the door through which mace was injected into the room. Soon thereafter, Officer McClusky fired two shots from his pistol through the door.

---

[2] "'Nunchaku', also known as 'nunchucks', is an Oriental martial arts weapon comprised of two pieces of wood or steel connected by a cord or chain which can be held in the hands. It had its origin as a farm implement in Okinawa." *United States* v. *George*, 778 F.2d 556, 558 n.1 (10th Cir. 1988).

When the door gave way, the armed force of officers entered the room. They then savagely beat the heads and bodies of the unarmed plaintiffs until most were reduced to an unconscious or semi-conscious state. McLeod repeatedly slammed Vincent Bordanaro's head against the wall and clubbed the other plaintiffs with a bat, all the while stating again and again, "Remember my name, John McLeod, don't forget it."

At some point before the door caved in, Sergeant Ferullo arrived at the entrance to Room 209. He stayed near the doorway a few moments after the door had been forced open, then left saying, "Frig this. I'm going downstairs."

Most of the persons in Room 209 sustained severe injuries. Vincent Bordanaro died as a result of the repeated blows to his head.

II. PROCEEDINGS BELOW

The plaintiffs are: Vincent Bordanaro (through the administratrix of his estate, his widow, Rose Bordanaro), Alfred J. Mattuchio, Anthony Dimino, Nicholas Medugno, Charles Cella, Charles Tardivo, Arthur Guttadaro, Mark Eldridge, Franci Felisi, Pamela Rickards, Beverly Ferrairo, Patricia Dimino, and Helen Bozzi [hereinafter plaintiffs or appellees]. Plaintiffs brought suit against a number of individual police officers, the Cities of Chelsea and Everett, their two Chiefs of Police and their two Mayors under the Civil Rights Act, 42 U.S.C. § 1983 and the Massachusetts Tort Claims Act, Mass. Gen. Laws Ann. ch. 258, § 2 (West 1988). The Mayors and the Chiefs of Police were sued individually and in their official capacities. Five individual officers defaulted;[3] the City

[3] The individual Everett officers were John McLeod, John Macauda, Richard Aiello, William McClusky and Patrick McFeeley. Sergeant Ferullo was also a defendant in the plaintiffs' § 1983 cause of action but was found not liable by the jury.

of Chelsea and the plaintiffs entered into a settlement agreement.

The jury returned a verdict against Everett, its Mayor (Edward Connolly) and its Chief of Police (Donald Bontempo) [hereinafter defendants, appellants, or Everett]. Following the trial the district judge awarded attorneys' fees to the plaintiffs as prevailing parties under 42 U.S.C. § 1988. The defendants' motions for judgment notwithstanding the verdict or for a new trial, were denied. The defendants then timely filed their motions of appeal.

Appellants allege the following grounds for reversal: (1) the evidence was insufficient as a matter of law to find either the municipality or its supervisory officials liable under § 1983; (2) the trial judge's instructions on causation misled the jury and set too low a standard on which to assess liability under § 1983; (3) the evidence was insufficient as a matter of law to hold Everett liable under the Massachusetts Tort Claims Act; (4) the trial judge erroneously admitted prejudicial evidence of events that took place after the incident in question in violation of Fed. R. Evid. 403; and (5) the trial judge erred in his assessment of attorneys' fees to the plaintiffs. We deal with each of these contentions in turn.

III. MUNICIPAL AND SUPERVISORY LIABILITY UNDER 42 U.S.C. § 1983

The standard to be used in reviewing a denial of a motion for judgment notwithstanding the verdict is well established.

> We cannot determine credibility, resolve conflicting testimony, or evaluate the weight of the evidence. Judgment n.o.v. should be granted only when the evidence could lead reasonable men to but one conclu-

> sion. *Fishman* v. *Clancy*, 763 F.2d 485, 486 (1st Cir. 1985); *Cazzola* v. *Codman & Shurtleff, Inc.*, 751 F.2d 53, 54 (1st Cir. 1984); *Rios* v. *Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 989 (1st Cir. 1978). And our review of the evidence and inferences fairly drawn therefrom must be made in the light most favorable to the prevailing party. *Robinson* v. *Watts Detective Agency, Inc.*, 685 F.2d 729, 732 (1st Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *DeVasto* v. *Faherty*, 658 F.2d 859, 861 (1st Cir. 1981).

Wildman v. *Lerner Stores Corp.*, 771 F.2d 605, 607 (1st Cir. 1985); *see Wierstak* v. *Heffernan*, 789 F.2d 968, 973 (1st Cir. 1986); *Kibbe* v. *City of Springfield*, 777 F.2d 801, 806-07 (1st Cir. 1985), *cert. granted*, 475 U.S. 1064 (1986), *cert. dismissed as improvidently granted*, 480 U.S. 257 (1987). It is these principles that control our review of the record.

In *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), the Supreme Court determined in what circumstances a municipality could be held liable under § 1983 for deprivations of constitutional rights suffered at the hands of municipal employees. It held that:

> a municipality cannot be held liable *solely* because it employs a tortfeasor — or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.
>
> * * *
>
> Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 691, 694 (emphasis in the original). Holding the city liable only if the injury results from an officially sanctioned policy or custom, exempts the municipality from responsibility for the aberrant and unpredictable behavior of its employees while making it liable for acts and conduct rightly attributable to the city. *See City of Canton* v. *Harris*, 57 U.S.L.W. 4270, 4272-74 (U.S. Feb. 28, 1989); *City of St. Louis* v. *Praprotnik*, 108 S. Ct. 915, 924 (1988); *Pembaur* v. *City of Cincinnatti*, 475 U.S. 469, 479-81 (1986); *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 817-18, 821 (1985); *id.* at 691-94.

In the instant case, the jury was presented with two alternative theories for finding that the plaintiffs' injuries[4] were caused by a "policy or custom" of the City of Everett. First, the plaintiffs asserted that their injuries were the direct result of an unconstitutional police department custom of breaking down doors without a warrant whenever its officers were apprehending a felon. Second, the plaintiffs maintained that their injuries had been caused by a custom or policy of gross negligence amounting to deliberate indifference in the recruitment, training, supervision or discipline of Everett's police officers. We address each of these arguments.

A. *Municipal Liability Based on an Unconstitutional Custom*

Section 1983 provides that any

> person who, under color of any . . . *custom or usage*, of any State or Territory . . . *subjects, or causes to be*

[4] This circuit has recognized that the use of excessive or unreasonable force or violence by law enforcement personnel resulting in personal injury deprives a person of liberty without due process of law in violation of the fourteenth amendment. *Voutour* v. *Vitale*, 761 F.2d 812, 818 (1st Cir. 1985) (citing *Landrigan* v. *City of Warwick*, 628 F.2d 736, 741-42 (1st Cir. 1980)), *cert. denied*, 474 U.S. 1100 (1986).

> *subjected*, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (emphasis added). In defining the parameters of the terms "custom" and "usage," the Court has instructed that:

> "Congress included customs and usages [in § 1983] because of the persistent and wide-spread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute 'customs or usage' with the force of law."

Monell, 436 U.S. at 691 (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 169-70 (1970)); *see Praprotnik*, 108 S. Ct. at 925-26.

Following this teaching, courts have established two requirements for plaintiffs to meet in maintaining a § 1983 action grounded upon an unconstitutional municipal custom. First, the custom or practice must be attributable to the municipality. In other words, it must be so well settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice. *See Spell* v. *McDaniel*, 824 F.2d 1380, 1386-88 (4th Cir.), *cert. denied*, 108 S. Ct. 752 (1988); *see also Praprotnik*, 108 S. Ct. 925-26; *Tuttle*, 471 U.S. at 818-20; *Voutour* v. *Vitale*, 761 F.2d 812, 820 (1st Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986). Second, the custom must

have been the cause of and the moving force behind the deprivation of constitutional rights. *See Tuttle*, 471 U.S. at 819; *Monell*, 436 U.S. at 694-95; *Kibbe*, 777 F.2d at 809-10; *see also City of Canton*, 57 U.S.L.W. at 4274; Annotation, *What Constitutes Policy or Custom for Purposes of Determining Liability of Local Government Unit under 42 U.S.C. § 1983 — Modern Cases*, 81 A.L.R. Fed. 549, 561-66, 571-83 (1987) (collecting and assessing various municipal policy/custom cases) [hereinafter Annotation, *§ 1983*]. We believe the evidence, when viewed in plaintiffs' favor, meets both requirements.

1. *Existence of the Custom.* Testimonial evidence from Sergeant Ferullo showed that the Everett Police Department had a longstanding, wide-spread, and facially unconstitutional practice of breaking down doors without a warrant when arresting a felon. Based upon his uncontroverted testimony and inferences reasonably drawn therefrom, the jury could have found that:

— The sergeant had been present at either "about 20 or 30" or "50, 60" situations involving door breakdowns over his 24-year tenure as a police officer.

— A 12-pound sledge hammer was provided by the City of Everett for use in breaking down doors.

— Numerous occasions in which doors were broken down by Everett officers involved the unconstitutional practice of breaking down doors without a warrant when attempting to arrest a felon. When asked whether this type of force was used by the Everett Police in effecting arrests the sergeant stated: "[Y]es, that's the way we've always applied it."

— The scenario at the King Arthur Motel appeared no different than any of the previous breakdowns made over the years.

— In breaking down the door at the King Arthur Motel, the officers were following what had been accepted departmental practice in the past.

This uncontradicted version of the arrest practice that was employed by the Everett Police Department proved that such an unconstitutional custom was " 'the way things [were] done and [had] been done' " in the City of Everett. *Kibbe*, 777 F.2d at 806 (quoting *Grandstaff* v. *City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987)).

Additional support for the existence of such a practice can be inferred from the event itself. This incident involved the joint actions of the entire night watch of the Everett Police Department. A reasonable inference to draw from this is that all of the officers involved were operating under a shared set of rules and customs. The fact that all of these officers acted in concert is further evidence that there was a pre-existing practice of breaking down doors when apprehending felons. Absent such a norm, it is highly unlikely such unanimity of action could occur. While it is true that evidence of a single event alone cannot establish a municipal custom or policy, *see, e.g., Tuttle*, 471 U.S. at 823-24 (opinion of Rehnquist, J.), where other evidence of the policy has been presented and the "single incident" in question involves the concerted action of a large contingent of individual municipal employees, the event itself provides some proof of the existence of the underlying policy or custom.[5] *See Kibbe*, 777 F.2d at 805-06; *Grandstaff*, 767 F.2d at 171-72; Annotation, *§ 1983*, 81 A.L.R. Fed. 549, 569-70 (1987).

2. *Attribution to the Municipality*. Although there was no direct evidence that the Chief of Police had actual knowledge of this policy of breaking down doors without a warrant, the evidence does support a finding of his constructive knowledge

[5] We are mindful of the difficulty plaintiffs encounter in proving the existence of such police department policies and customs. Plaintiffs are likely to encounter hostile witnesses and incomplete documentation of past abuses. *See Grandstaff* v. *City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987).

of it. Constructive knowledge "may be evidenced by the fact that the practices have been so widespread or flagrant that in the proper exercise of [their] official responsibilities the [municipal policymakers] should have known of them." *Spell* v. *McDaniel*, 824 F.2d at 1387; *see Voutour*, 761 F.2d at 820; *Webster* v. *City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984) (en banc); *Bennett* v. *City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985).

The evidence is sufficient to prove that the Chief should have known of the unconstitutional arrest practices. The Chief's own testimony and that of others was that he oversaw the operations of the department and set much of its policy. The evidence showed that the Chief utilized an extensive report review process to monitor the conduct of his officers and to ensure their compliance with the rules of the department. Such a review process would alert the Chief to practices that transgressed department policy. Knowledge of the practice may thus be imputed to the Chief. And allowing this custom to continue amounted to a deliberate indifference to the rights of the citizens of Everett, making a constitutional violation " 'almost bound to happen, sooner or later.' " *Spell*, 824 F.2d at 1391; *see also City of Canton* v. *Harris*, 57 U.S.L.W. at 4273. In this case, the jury could conclude that there was "supervisory encouragement, condonation and even acquiescence" in the unconstitutional practice. *Voutour*, 761 F.2d at 820 (noting absence of supervisory acquiescence in that case). Chief Bontempo's failure to eradicate this facially unconstitutional practice from the police department attributes that custom to the municipality.

Everett's contention that the Chief of Police cannot be considered a policymaker for the police department is unavailing. Testimony from the Chief and Mayor Connolly established that, in regard to law enforcement decisions, the Chief was one "whose acts or edicts may fairly be said to represent official

policy." *Monell*, 436 U.S. at 694; *see City of St. Louis* v. *Praprotnik*, 108 S. Ct. at 924-28; *Pembaur* v. *City of Cincinnatti*, 475 U.S. at 480-81; *see also Spell*, 824 F.2d at 1394-95.

3. *The Causal Link*. The Supreme Court has declared that to support liability under § 1983, a municipal custom must have been the "moving force" behind the plaintiff's injury. *See Tuttle*, 471 U.S. at 819; *Monell*, 436 U.S. at 694-95; *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981); *Milligan* v. *City of Newport News*, 743 F.2d 227, 230 (4th Cir. 1984). There must be some "affirmative link" between the municipal custom and the constitutional deprivation. *See Tuttle*, 471 U.S. at 824-25 & n.8 (opinion of Rehnquist, J.); *Kibbe*, 777 F.2d at 808; *Voutour*, 761 F.2d at 819-20; *see also City of Canton*, 57 U.S.L.W. at 4274. Everett argues that there is no evidence that the officers were following the alleged custom on the night of July 22-23, 1982. It contends that the police were not apprehending felons but, rather, were seeking revenge. We disagree.

Testimony from a number of sources indicated that the officers were in the process of arresting one or more felons. Most importantly, Sergeant Ferullo testified that the officers on the scene had told him they were in the process of apprehending and arresting certain individuals and, later, that he was told arrests were made. Moreover, as Sergeant Ferullo noted, the breaking down of the door at the King Arthur Motel was no different from previous cases, in that all involved situations where doors had been broken down to apprehend felons. The officers were, therefore, following regular police practice.

The jury could reasonably have concluded that the plaintiffs' injuries occurred as a direct and immediate consequence of this unconstitutional municipal custom. Everett's arrest practice was both affirmatively linked to and the moving force behind the plaintiffs' constitutional deprivations. If a *constitutional* practice of arrest had been the accepted norm in the Everett Police Department, the officers would have been forced

to obtain a warrant before entering Room 209. The additional cooling-off time that this would have afforded and the imposition of an impartial judicial officer's assessment of the situation would have greatly reduced, if not totally removed, the likelihood of any police overzealousness in this case. Indeed, this is one of the underlying reasons for the warrant requirement. *See* 2 W. LaFave, *Search and Seizure*, § 4.1 (1987) and cases cited therein. Under the existing practice, however, the officers knew they could knock down the door to Room 209 and reach the persons inside without violating department policy. The jury's conclusion that this custom caused the plaintiffs' injuries is thus amply supported by the record.[6]

In sum, a well-settled, unconstitutional practice of breaking down doors without warrants existed in Everett as of July 22-23, 1982. The Chief of Police had constructive knowledge of this custom yet did nothing to stop the practice. This made it almost inevitable that a constitutional injury would be suffered by some future party. The custom was the moving force behind and the cause of the violation in this case. Therefore, the jury's imposition of § 1983 liability on Everett based upon this unconstitutional custom is affirmed.

B. *Municipal Liability Based on a Deficient Custom or Policy in the Recruitment, Training, Supervision or Discipline of Everett Police Officers*

The City was also found liable under § 1983 for having a policy of inadequate recruitment, training, supervision or dis-

[6] This scenario is in sharp contrast to the cases cited by the defendants where the causal link between the policy alleged and the constitutional injury was tenuous at best. *See Martinez* v. *California*, 444 U.S. 277, 285 (1980) (no § 1983 liability where state released individuals from custody who subsequently injured third parties); *Estate of Gilmore* v. *Buckley*, 787 F.2d 714, 720 n.10 (1st Cir.) (same), *cert. denied*, 479 U.S. 882 (1986).

cipline of its police officers. The jury found that this policy evidenced gross negligence amounting to deliberate indifference to the constitutional rights of those with whom the police would come into contact. Everett now argues that the evidence was insufficient as a matter of law to support this finding. We disagree.

After the case at bar had been decided below, the Supreme Court issued its decision in *City of Canton* v. *Harris*, 57 U.S.L.W. 4270. The issue presented to the Court in that case was whether a municipality could be held liable under § 1983 "for constitutional violations resulting from its failure to train municipal employees." *City of Canton*, 57 U.S.L.W. at 4271. The Court held that "only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." 57 U.S.L.W. at 4273.

The Court then addressed what type of evidence was necessary to establish such deliberate indifference. It stated:

> *Monell*'s rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible. That much may be true. The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to

specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. See *Springfield* v. *Kibbe*, 480 U.S. at 268 (O'Connor, J., dissenting); *Oklahoma City* v. *Tuttle*, [471 U.S.] at 821 (opinion of Rehnquist, J.). It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

57 U.S.L.W. at 4273-74.

With these teachings in mind, we address the question of whether the evidence presented at trial was sufficient to prove that Everett officials were deliberately indifferent to the need for better recruitment, training, supervision and discipline of the city's police force.

1. *The Existence of the Policy.* The evidence adduced at trial supports the finding that the City of Everett failed to provide minimally acceptable standards of recruitment, training, supervision or discipline of its police force. In the instant action, the jury was not asked to infer the existence of this policy based solely on the incident at the King Arthur Motel. "Rather, there was direct evidence presented to the jury of the City of [Everett's] failure to train and supervise its officers in a number of key areas of law enforcement and of its indifference to the circumstances of [the plaintiffs' beatings]." *Wierstak*, 789 F.2d at 975.

The evidence on this issue and reasonable inferences to be drawn from it was as follows:

— The City of Everett was operating under a set of rules and regulations promulgated in 1951 and last distributed to the officers in the mid-sixties. The Rules and Regulations of the Everett Police Department [hereinafter Rules and Regulations], which comprised the day-to-day guidelines for the department,[7] failed to address contemporary law enforcement issues and lacked sufficient detail to serve as the operating directives of a modern police force. Specifically, they failed to addrress up-to-date standards governing search and seizure, hot pursuit and the use of deadly force. Reiter, the plaintiffs' expert on police procedures, testified that these regulations were deficient in almost every way.

[7] While there was some evidence that the Everett Police Department was also governed through a document known as the Police Manual for the Police Department of the City of Everett, the jury may reasonably have concluded from the evidence that the Rules and Regulations of the Everett Police Department were the only regulations in force as of July 22-23, 1982.

— Aside from emergency medical instruction, Everett officers received little or no formal training after completing their initial police academy courses. The officers thus lacked up-to-date direction in many police procedures, including the proper use of force.

— The City of Everett discouraged officers from seeking out supplementary training courses.

— Reiter testified as to the necessity and importance of establishing mandatory and current training for all members of a municipal police force.

— Massachusetts state law provided that police officers who enrolled in college law enforcement courses were to receive increased monetary benefits from their employers. The police officers of Everett were forced to sue the city to compel it to provide these benefits.

— There was no supervisory or command training required upon promotion to a higher rank. Supervisory officers, therefore, lacked the basic training due all officers *and* the command training necessary to effectively supervise and operate a police force.

— Since few rules or guideposts for conduct were in force, the organization of the police department placed too much discretion at all operating levels.

— Background checks of prospective officers, which Reiter testified to be the best indication of future performance, were superficial, at best, and failed to reach minimal levels of acceptability. In particular, psychological examinations, which a city ordinance required be given to all police officers, were often not performed.

— The Chief of Police failed to make written, monthly reports to the Mayor concerning the department, as was required by city ordinance. Reiter testified that the Chief's oral discussions with the Mayor could not substitute for written, in-depth reports on the activities of the department.

— In the past, discipline had been meted out haphazardly, inconsistently, and infrequently to Everett officers.

— No disciplinary actions were instituted against the officers involved in this incident until over one month after the episode. A number of the officers were then suspended, because they had been indicted by the Suffolk County District Attorney.

— A full, *internal* investigation by the Everett Police Department did not occur until over one year after the King Arthur indicent.

— Sergeant Ferullo received a short suspension as a result of this investigation. His suspension was subsequently overturned on appeal based, in part, on the fact that he had received inadequate supervisory training to be a police sergeant.

— Reiter testified that the Chief's review of civil grievances filed against Everett officers for their misconduct fell well below accepted levels. Indeed, many complaints were placed in a dead letter drawer never to be seen again.

— In a 1983 letter concerning an officer's misconduct, the Chief wrote: "Gone are the days when accountability is scoffed at." From this statement, it might reasonably be inferred that Everett officials had given little attention to instances of police misconduct in the past.

— The Chief and the Mayor had received oral and written requests for better training and organizational improvements prior to the incident at King Arthur. They were aware of the issue, discussed it, and decided to institute no additional training programs. Later requests for better training by Everett police officers were ignored.

— Prior to the incident at the King Arthur Motel, Lieutenant Stewart, the main advocate for better training and guidance among the Everett officers, told both the Mayor and the Chief that something bad would happen if more instruction were not provided to the police force.

In addition to the evidence outlined above, we believe that the jury could have considered the incident itself in determining what type of recruitment, training, supervision and discipline were given to Everett police officers. As with the unconstitutional custom of breaking down doors discussed, *supra*, there is independent evidence concerning the police department policy. The incident involved a series of interrelated acts of assault carried out by individual police officers. This, combined with the fact that there was other, independent evidence regarding police department policy, makes the police conduct at the motel evidence directly bearing on the officers' recruitment, training, supervision and discipline.[8] It is reasonable to infer from what happened that these police officers received the same training and supervision and had similar understandings about whether they would be subject to discipline for their actions. *See Kibbe*, 777 F.2d at 805-06; *Grandstaff*, 767 F.2d at 171-72; Annotation, *§ 1983*, 81 A.L.R. Fed. 549, 569-70 (1987).

Based upon all the foregoing, the jury was well within its discretion in finding that the recruitment, training, supervision or discipline of Everett police officers was grossly and flagrantly deficient.

2. *Attribution to the Municipality*. In addition to proving the great inadequacies in the recruitment, training, supervision or discipline of Everett police officers, plaintiffs must also establish that municipal officials charged with the responsibility of making policy for the police department were " deliberately indifferent" to these failings. *See City of Canton*, 57 U.S.L.W. at 4273-74. Only if there were such deliberate indif-

[8] We note that a "single incident" of misconduct, without other evidence, cannot provide the basis for municipal liability under § 1983. Such a result would be the equivalent of imposing *respondeat superior* liability upon the municipality. *See Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823-24 (1985); *see also City of St. Louis* v. *Praprotnik*, 108 S. Ct. 915 , 923-24 (1988).

ference could the municipality be held liable under § 1983. *See id.*; *Voutour*, 761 F.2d at 821-22; *see also Spell*, 824 F.2d at 1387. We believe plaintiffs have carried this burden.

Evidence was presented that the Chief of Police, and ultimately the Mayor of Everett, were responsible for the recruitment, training, supervision and discipline of the Everett police force. There was testimony by the Chief that, although the Mayor as Chief Executive Officer of the city held the paramount authority, the creation of policy and the day-to-day functioning of the department was left to the Chief of Police. The Mayor agreed with this and testified that the Chief was the department head but that he, the Mayor, was informed daily as to the actions of the police department and was the decisionmaker on many important issues. Moreover, the Rules and Regulations imply such a coupling of responsibility between the Chief of Police and the Mayor. The jury could have reasonably concluded, then, that both of these men were ones "whose acts or edicts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694; *see Praprotnik*, 108 S. Ct. at 924-28; *Pembaur*, 475 U.S. at 480-81. They were the policymakers for the city regarding law enforcement matters.

Based on the following evidence the jury could have found that both the Chief and the Mayor had express knowledge of the lack of any effective policy for the recruitment, training, supervision or discipline of Everett police officers:

— Each had received complaints from Everett officers concerning inadequate police training and the dangers that this presented to civilians. The issue and its consequences were discussed by the Mayor and the Chief. They determined that no more training would be provided.

— Everett officers who sought out further training were affirmatively discouraged from doing so.

— The testimony of the Mayor and the Chief indicate clearly that they knew that there was no mandatory training required of

Everett patrolmen or supervisory officers, aside from emergency medical instruction and police academy training.

The Mayor had been sued by Everett police officers to force him to pay the monetary benefits due them under a state law that compelled municipalities to give economic incentives to police officers who voluntarily take college-level law enforcement courses.

— Both men had the responsibility for overseeing the department and the discipline of its officers. The Mayor and the Chief were aware of the acts perpetrated at the King Arthur Motel yet chose to take no disciplinary actions against the officers until they had been indicted.

The jury had solid evidentiary grounds for finding that the failure of the Mayor and the Chief of Police to institute a minimally acceptable program of recruitment, training, supervision or discipline amounted to a deliberate indifference to the constitutional rights of the city's inhabitants. *See City of Canton*, 57 U.S.L.W. at 4274. The consequence of this policy was that the Everett police force was ill-prepared and ill-equipped to perform the obvious and recurring duties of police officers. *See id.*, 57 U.S.L.W. at 4273-74; *id* at 4275 (O'Connor, J., concurring in part and dissenting in part). The "do nothing policy" of the Mayor and the Chief exposed the citizens of Everett to imminent police misconduct, and was attributable to the municipality. *See id.* at 4273-74.

3. *The Causal Link.* In order to hold the city liable for their injuries under § 1983, the plaintiffs must also establish that there was a direct causal connection between the policy of inadequate recruitment, training, supervision or discipline and the deprivations of their constitutional rights. This connection needs to rise above a mere but/for coupling between cause and effect, *see City of Canton*, 57 U.S.L.W. at 4273-74; *Tuttle*, 471 U.S. at 823 (opinion of Rehnquist, J.); for "[i]n every

instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident. *See Oklahoma City* v. *Tuttle, supra*, at 823 (opinion of Rehnquist, J.)." *City of Canton*, 57 U.S.L.W. at 4274. To form the basis for liability under § 1983, a municipal policy must be affirmatively linked to and the moving force behind the constitutional violation. *See Monell*, 436 U.S. at 694; *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1982). *See also id*. The evidence was sufficient to prove such a causal connection.

The jury could have found that the failure of the entire night watch of the Everett Police Department to act at even minimally acceptable levels of police conduct was directly linked to the city's policy of deficient recruitment, training, supervision and discipline of its police force. The Rules and Regulations contained no information, and the Everett officers were given no up-to-date training on, the use of force — deadly or otherwise — hot pursuit, or search and seizure. The lack of proper training on these essential elements of law enforcement led directly to the constitutional violations at the King Arthur Motel. Due to the inadequacy of his supervisory training, Sergeant Ferullo abdicated his responsibility to the plaintiffs and left a volatile scene that demanded control by a supervisory officer. The absence of a strictly enforced disciplinary system led the officers at the King Arthur Motel to believe they were above the law and would not be sanctioned for their misconduct.[9] A sufficiently supervised, properly recruited, trained and disciplined group of officers would not have acted so far below the level of accepted police behavior.

[9] Indeed, a full investigation of this event did not occur until a year after the event. Officer McKlusky was never disciplined for the discharge of his service revolver into Room 209.

Based on all the foregoing, we affirm both the jury's finding that the plaintiffs' injuries were caused by a policy of the City of Everett and its imposition of § 1983 liability on the city. We point out that liability is levied here not because the city hired "one 'bad apple,'" *see Tuttle*, 471 U.S. at 821, but because the city's police policy produced an entire barrel of bad apples.

C. *Supervisory Liability of Mayor Connolly and Chief Bontempo*

Everett argues that the evidence was insufficient to impose punitive damages against Mayor Connolly and Chief Bontempo.[10] It asserts that there was no evidence which could support a finding that either the Mayor or the Chief acted with "evil motive or intent, or . . . reckless or callous indifference to the federally protected rights of others" in running the Everett Police Department. *Smith* v. *Wade*, 461 U.S. 30, 56 (1983). *See Germany* v. *Vance*, No. 88-1578, slip op. at 27 (1st Cir. Feb. 14, 1989). We disagree. Based on the evidence, which is thoroughly detailed in parts III (A) (1-2) and III (B) (1-2), *supra*, reasonable jurors could have concluded that the conduct of the Mayor and the Chief of Police in administering the Everett Police Department showed a reckless or callous indifference to the rights of others.

Everett's final contention, that this type of harm was not a foreseeable consequence of either a custom of breaking down doors when arresting felons or a policy of inadequate training, etc., is unavailing. As discussed in parts III (A) (3) and III (B) (3),

[10] The Chief was found liable under both the unconstitutional custom theory and the inadequate training theory. The Mayor was deemed liable solely under the latter theory. The Mayor was assessed twenty thousand dollars in punitive damages; the Chief's punitive damages were assessed at thirty thousand dollars.

supra, an unbridled use of force was an almost certain consequence of a police department that acquiesced in unconstitutional arrest practices and had a policy which provided no training or guidelines on the modern standards governing arrest or the use of force, inadequate training of its command officers and supervision of its inferior officers, and little or no disciplining of police misconduct. Moreover, Lieutenant Stewart expressly told the Chief and the Mayor, prior to July 22-23, 1982, that something bad would happen unless the training and organization of the Everett police force were improved. We believe the evidence, as viewed in the plaintiffs' favor, supports the jury's imposition of punitive damages against the Mayor and the Chief.

IV. THE JURY CHARGE

Everett contends that the trial judge's instructions were misleading and failed to accurately define the applicable legal standards to the jury. Specifically, it asserts that (1) his instruction as to gross negligence amounting to deliberate indifference was confusing and set too low a standard under which to assess § 1983 liability and (2) his instruction as to causation did not require that the jury find a direct causal connection between the municipal custom or policy and the harm suffered before imposing liability on the city. We reject each of these protests.

A. *The "Gross Negligence Amounting to Deliberate Indifference" Instruction*

Everett stated at trial and now maintains that by instructing the jury on a theory of "gross negligence amounting to deliberate indifference," the trial judge "deprived the jury of a basic

understanding of the deliberateness of municipal action required in order for there to be liability." Brief for Appellants at 26. Appellants urge that the trial court should have charged that for the city to be held liable, the municipal officials must have acted either intentionally or with reckless disregard for the consequences of their actions. The standard, however, is no longer open for argument. The Supreme Court has held that "deliberate indifference to the rights of persons with whom the police come into contact" is the degree of fault necessary to hold a municipality liable under § 1983 for the inadequate training, etc., of its police force. *City of Canton* v. *Harris*, 57 U.S.L.W. at 4273; *see also Voutour*, 761 F.2d at 820 (adopting same standard in First Circuit). The trial judge's decision to use the deliberate indifference instruction rather than the intentional or reckless disregard instruction, therefore, was correct.

Everett next argues that even if gross negligence amounting to deliberate indifference is the proper standard, the judge's instructions describing that standard were wanting and likely confused the jury. We disagree. It is axiomatic that a party is entitled to a charge that adequately explains the law and does not mislead the jury. *See, e.g., Aubin* v. *Fudala*, 782 F.2d 280, 284 (1st Cir. 1983). Each charge, however, must be judged in its entirety. *See Francis* v. *Franklin*, 471 U.S. 307, 315 (1985); *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973); *Dyer* v. *Ponte*, 749 F.2d 84, 88 & n.5 (1st Cir. 1984); *Service Merchandise Co.* v. *Boyd Corp.*, 722 F.2d 945, 950 (1st Cir. 1983); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2558 at 668 & n.32.

In the case at bar, the judge described the standard of gross negligence amounting to deliberate indifference as follows:

> The fourth question has to do with the liability of the City of Everett with respect to recruitment, train-

ing, supervision, or disciplining of police officers amounting to deliberate indifference to the Civil Rights complainants, gross negligence. And the authorities in this Circuit say that if there is a causal connection, an affirmative link between failure in recruitment, training, and discipline and the conduct of the police, which is the result of gross negligence amounting to deliberate indifference, then the city may be liable. What is gross negligence amounting to deliberate indifference? The appellate courts generate these phrases in an attempt to guide us, and they have a rhetorical right [*sic*; ring] to it. It sounds pretty fine. Gross negligence amounting to deliberate indifference. What does it mean? How do we flesh that rhetoric out to give it meaning in a particular case? I can help a little, I think, I hope, but basically you have to do that. I can't change that, I can't change the standards or alter them. You have to take what I have just said to you and make of it a rule to govern this case and these facts.

I think, perhaps I suggest to you, and you can take this for what it's worth, that if we were to talk about gross indifference amounting to — excuse me, gross negligence amounting to deliberate indifference and we are to talk about it out of this context, out of the formal context of the courtroom, we might put it in terms of somebody just not giving a damn, somebody putting convenience, self-protection, even budgets ahead of the duty imposed to protect and preserve the citizens, the community, and I think I can also say that as a matter of law, the primary duty of the police departments and policemen is to protect and preserve life and property and the public peace. And if the City of Everett, through its super-

> vising people, made a deliberate choice to follow a course of action or non-action which, in effect translates as "we don't give a damn," then liability would be imposed under this section.
>
> The official language, however, is gross negligence amounting to deliberate indifference, and you don't have to agree with me as to the vernacular translation of that, you can flesh that language out as you see it.

Everett alleges that equating deliberate indifference with "not giving a damn" is error since it is confusing and fails to instruct that the municipal official involved must realize that his conduct is exposing the public to an unreasonable risk of foreseeable harm. We find that the judge's charge, read as a whole, correctly defines the appropriate standard.

In addition to the portion of the charge already quoted, the judge instructed the jury:

> When we come to the supervising officers in the city, we have a different standard. The city and the supervising officers are liable only if there was a policy or practice, they deliberately chose a policy or practice which you find had a causal connection to the events which occurred on July 23rd.

He then twice read the Supreme Court's plurality holding in *Pembaur* v. *City of Cincinnatti*, 475 U.S. at 483-84.

> We hold that municipal liability under Section 1983 attaches where, only where a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

In *City of Canton*, the Court reiterated its holding in *Pembaur* and explained that where "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, . . . the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." 57 U.S.L.W. at 4273.

The district judge's explanation of deliberate indifference, read with the rest of his instructions, adequately states the correct legal standard as established by the Supreme Court for imposing municipal liability under § 1983.

Everett's final contention is that by allowing the jury to adopt its own definition of gross negligence amounting to deliberate indifference, the trial court invited the jury to find liability on a standard *lower than* gross negligence amounting to deliberate indifference. We cannot agree. First, the judge clearly instructed the jury that "negligence was not enough under 1983." Second, his overall charge, which specified both his definition of gross negligence amounting to deliberate indifference and the Supreme Court's holding in *Pembaur*, accurately describes the legal standard that they jury was to apply. Third, we do not believe that the judge invited the jury to come up with their own definition of the legal standard of gross negligence amounting to deliberate indifference. Rather, he stated: "The official language . . . is gross negligence amounting to deliberate indifference, and you don't have to agree with me as to the vernacular translation of that, you can flesh that language out as you see fit." As we read the charge, he instructed the jury that it did not have to accept his vernacular example of "not giving a damn." We cannot say this constitutes reversible error.

B. *The Causation Instruction*

Everett maintains that the judge's charge as to causation allowed the jury to impose liability based upon only a weak con-

nection between the city's custom or policy and the plaintiffs' injuries. We hold that the trial judge's instructions regarding causation met the standards established by the Supreme Court. The Court requires that there be an "affirmative link" between the policy or custom alleged and the harm suffered, such that the policy or custom can be said to have been the "moving force" behind the constitutional violation. Here, in explaining the concept of causation the trial judge instructed:

> It is not enough to say, oh, that was bad police administration, that was sloppy, that was a violation of an ordinance or whatever. You have to show that there was a causal relationship, likely causal relationship; that is, the plaintiffs have to persuade you by a preponderance of the evidence that there was a causal relationship between whatever policies were adopted and the harm that the plaintiffs suffered.
>
> What is required under the Supreme Court's ruling in these matters is an affirmative link, an affirmative link between the conduct of the city and its supervisory officials and the harm that befell the plaintiffs.
>
> * * *
>
> When I say "caused" . . . I'm talking about whether the policy or the acts complained of were a moving force of the violation, whether there is an affirmative link between the conduct complained of and the harm suffered.

It is the rule of this circuit that a "defendant is not entitled to any specific words of instruction, but only to instructions that properly convey the applicable law of the case." *Kibbe*, 777 F.2d at 810 (collecting authorities). We believe that this instruction explained the applicable legal standards and adequately ensured that the jury not levy liability based upon only a remote causal link.

V. THE ADMISSION OF POST-EVENT EVIDENCE

The defendants next contend that the trial judge committed reversible error by admitting certain evidence regarding events that transpired *after* the date of the beatings. The minimal probative value of these events, the defendants assert, is greatly outweighed by their unfair prejudicial effect, and, therefore, the evidence should have been excluded under Fed. R. Evid. 403.

The balancing done under Rule 403 between the probative value of a piece of evidence and its prejudicial effect is committed to the trial judge's discretion. *United States* v. *Mateos-Sanchez*, 864 F.2d 232, 235-36 (1st Cir. 1988); *United States* v. *Simon*, 842 F.2d 552, 555 (1st Cir. 1988); *Onujiogu* v. *United States*, 817 F.2d 3, 6 (1st Cir. 1987) (collecting First Circuit cases). "Only rarely — and in extraordinary compelling circumstances — will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect." *Freeman* v. *Package Machinery Co.*, No. 88-1130, slip op. at 7 (1st Cir. Nov. 22, 1988); *see United States* v. *Tierney*, 760 F.2d 382, 388 (1st Cir.), *cert. denied*, 474 U.S. 843 (1985).

In the case at bar, the trial judge admitted post-event evidence of the lack of proper internal investigation of the attack and the failure to take strong disciplinary action against the officers involved. The judge's rationale was that this evidence would tend to show what customs or policies were in effect in the City of Everett *before* the date of the attack. Such use of post-event evidence was expressly allowed by the Fifth Circuit in *Grandstaff* v. *City of Borger*, 767 F.2d 161 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1986). *Grandstaff* involved the alleged improper use of deadly force by a group of police officers that resulted in the plaintiffs' death. The court held:

> The policymaker's disposition, his policy on the use of deadly force, after August 11 [the date of the incident] was evidence of his disposition prior to August 11. See 2 Wigmore, Evidence §§ 382, 437 (Chadbourn rev. 1979). As subsequent conduct may prove discriminatory motive in a prior employment decision, *see McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), and subsequent acts may tend to prove the nature of a prior conspiracy, *see Anderson* v. *United States*, 417 U.S. 211, 219, 94 S.Ct. 2253, 2260, 41 L.Ed.2d 20 (1974), so the subsequent acceptance of dangerous recklessness by the policymaker tends to prove his preexisting disposition and policy.

767 F.2d at 171.

The *Grandstaff* "court emphasized that the police chief's failure to make changes in practice in the aftermath of this incident allowed an inference that the officers' actions were 'the way things are done and have been done in the City of Borger,' and thus reflected city policy." *Kibbe*, 777 F.2d at 806 (quoting *Grandstaff*, 767 F.2d at 171) (citation omitted). Contrary to the defendant's contention, the Supreme Court's recent opinion in *City of St. Louis* v. *Praprotnik*, 108 S. Ct. 915, does not foreclose such use of post-event evidence. In *Praprotnik*, a plurality of the Justices determined that to be actionable under § 1983, a municipal policy or custom must have been adopted or acquiesced in by an actor with " 'final policymaking authority.' " *Id.* at 924. The Court has never held that inferences about what customs or policies existed in a city before an event could not be drawn from subsequent actions. Post-event evidence can shed some light on what policies existed in the city on the date of an alleged deprivation of constitutional right.

We thus affirm the lower court's decision that any possible unfair prejudice resulting to the defendant from the introduction of this evidence is outweighed by the probative value it possesses.[11]

VI. ATTORNEYS' FEES

Defendants allege that the district court made two errors in calculating its award of attorneys' feees under 42 U.S.C. § 1988.[12] First, the court compensated the plaintiffs for time spent examining and researching theories that ultimately proved to be irrelevant to the case. The inclusion of these misspent hours in the fee calculation, the defendants assert, resulted in an overestimation of the reasonable number of hours expended on the case. Second, plaintiffs did not provide evidence of, nor did the district court make a ruling as to the rea-

[11] The trial judge admitted this evidence solely as to the 42 U.S.C. § 1983 cause of action. He expressly foreclosed the jury from using it to find municipal liability under the Massachusetts Tort Claims Act. The trial court instructed the jury as follows:

> They [the post-event incidents] are not admissible as relating to or not independently admissible as relating to the cause of that turmoil at that time, but they are admissible only insofar as they may illuminate for you the policies and attitudes of the administration of the City of Everett as it existed prior to July 22 and July 23, the theory being that there may be a continuity in municipal policy so that what happens after the event may cast some light on what the policy was prior to the event. Now that's the only purpose for which I am admitting this post July '82 evidence.

[12] While there may be other factors that affect the final calculation of attorneys' fees, *see* Annotation, *Construction and Application of Civil Rights Attorney's Fees Award Act of 1976*, 43 A.L.R. Fed. 243, 298-303 (1979), the basic procedure is to multiply the number of hours reasonably spent preparing the case by the prevailing hourly rate in the community for comparable legal services. *See Blum* v. *Stenson*, 465 U.S. 886, 892-95 & nn. 5-11 (1984); *Hensley* v. *Eckerhart*, 461 U.S. 424, 433-34 (1983).

sonable hourly rate prevailing in the community for similar legal services. Instead, defendants maintain, the court based its hourly rate calculation solely on the affidavits of the plaintiffs' attorneys. Since the Supreme Court has declared that the plaintiff bears the burden of establishing what the prevailing market rate is for comparable legal services, *Blum* v. *Stenson*, 465 U.S. 886, 895 n.11 (1984), the defendants argue that the case must be remanded to determine the reasonable hourly rates for the services rendered by plaintiffs' attorneys.

We note initially the great discretion that is to be afforded a district court's determination of attorneys' fees under 42 U.S.C. § 1988. *See Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983); *Lund* v. *Affleck*, 587 F.2d 75, 77-78 (1st Cir. 1987); *King* v. *Greenblatt*, 560 F.2d 1024, 1026 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). We may reverse the award granted by the district court only if we find that there has been an abuse of that discretion. *Wojtkowski* v. *Cade*, 725 F.2d 127, 130-31 (1st Cir. 1984); *Grendel's Den, Inc.* v. *Larkin*, 749 F.2d 945, 950-51 (1st Cir. 1984). Thus, while "appellate courts have a duty to review carefully the basis for the award and to ensure that the amount is reasonable," *Grendel's Den, Inc.*, 749 F.2d at 950, the lion's share of the responsibility for setting attorneys' fees is vested in the district court judge.

We deal first with the lower court's calculation as to the number of hours reasonably expended on this case and affirm its determination. The attorneys for the plaintiffs supplied the court with contemporaneous time records that set forth the number of hours they had spent working on this litigation. *See Grendel's Den, Inc.*, 749 F.2d at 952 (requiring those requesting attorneys' fees under 42 U.S.C. § 1988 to submit time sheets documenting the hours that they had spent on the case); *Wojtkowski*, 725 F.2d at 130 (same). Contrary to the defendants' contentions that the court blindly accepted the plaintiffs' proffered number of hours, the district judge painstakingly re-

viewed the detailed time records submitted by the plaintiffs' counsel. He then excluded a number of hours finding them to be unreasonable. As to the time spent researching inapplicable theories, the judge dealt with this by denying plaintiffs' request for an enhancement of the fee. He stated that:

> Plaintiffs took a number of wrong turns in the early years of this litigation. Indeed, at one point plaintiffs had to file amended complaints because their complaint against the cities and the supervisory personnel had been dismissed. . . . In light of the compensation plaintiffs' counsel are receiving for these hours, an additional contingency risk multiplier is not appropriate.

Based on this reasoning and our own review of the time records, we find no abuse of discretion in the lower court's careful calculation of the number of compensable hours. *See Hensley*, 461 U.S. at 433-34; *Fidelity Guarantee Mortgage Corp.* v. *Reben*, 809 F.2d 931, 936 (1st Cir. 1987); *Wildman* v. *Lerner Stores Corp.*, 771 F.2d 605, 610 (1st Cir. 1985).

The defendants' request for a remand because the district court failed to make a finding as to the "prevailing market rate" has significantly more merit. We believe that *Blum* v. *Stenson* places a burden on a party requesting attorneys' fees to establish — by evidence other than his own attorneys' affidavits — the prevailing hourly rate in the community for comparable legal services. The *Blum* Court stated:

> In seeking some basis for a standard, courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, *the burden is one the fee applicant to produce satis-*

> *factory evidence — in addition to the attorney's own affidavits — that the requested rates are in line with those prevailing in the community* for similar services by lawyers of reasonably comparable skill, experience, and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to — for convenience — as the prevailing market rate.

465 U.S. at 895 n.11 (emphasis added). This circuit has consistently followed that teaching. *See Hall* v. *Ochs*, 817 F.2d 920, 928-29 (1st Cir. 1987); *Reben*, 809 F.2d at 936; *Wildman*, 771 F.2d at 610; *Grendel's Den, Inc.*, 749 F.2d at 955-56; *see also Segal* v. *Gilbert Color Systems, Inc.*, 746 F.2d 78, 85-87 (1st Cir. 1984) (applying *Blum* rationale to the determination of attorneys' fees under 28 U.S.C. § 1875). While some courts have indicated that a district court may rely on its own knowledge of attorney's rates in the area, *see Wojtkowski* 725 F.2d at 130-31, "something more than a bald, unsupported amount is necessary." *Chalmers* v. *City of Los Angeles*, 796 F.2d 1205, 1211 n.3 (9th Cir. 1986).

In the case at bar, plaintiffs have failed to carry their burden of proving the prevailing market rate. They have produced no evidence that would establish the prevailing rate for comparable legal services other than their own attorneys' affidavits. Moreover, due to this lack of evidence, the district court failed to make a determination as to the prevailing market rate. Even though the defendants have not shown that the rates utilized by the lower courts were, in fact, improper, we believe that the failure of the district court to determine the prevailing rate constitutes an abuse of discretion and requires a remand. *See Ramos Colon* v. *Secretary of Health and Human Services*, 850 F.2d 24, 27 (1st Cir. 1988) (per curiam) (noting failure of party to establish prevailing rate required remand to reassess

attorneys' fees in a Social Security Act case). On remand, the "district court must provide a 'clear explanation of its reasons for the fee award.'" *Grendel's Den, Inc.*, 749 F.2d at 950 (quoting *Hensley*, 461 U.S. at 437).

Since a remand is necessary to reassess the attorneys' fee award, the plaintiffs have asked that the district court also be allowed to reconsider its denial of their request for an enhancement of the attorneys' fees award based on the complexity and the high risk of failure associated with bringing this case. We reject this request; the remand is to consider only the narrow issue of determining the prevailing rate in the community for comparable legal services. Once that rate has been found and is then multiplied against the already established number of hours expended by the plaintiffs' attorneys, the district court's job will be over.

VII. CONCLUSION

> Police officers must comport themselves in accordance with the laws that they are sworn to enforce *and* behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.

Police Comm'r of Boston v. *Civil Serv. Comm'n*, 22 Mass. App. Ct. 364, 494 N.E.2d 27, 32, *review denied*, 398 Mass. 1103, 497 N.E.2d 1096 (1986).

We affirm the judgment below holding the City of Everett liable under § 1983. We do not reach the state-law questions.

Remanded for a redetermination of attorneys' fees.

So ordered.

Costs to appellees.

APPENDIX B

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 88-1563

ROSE BORDANARO, ET AL.,
Plaintiffs-Appellees,
v.
JOHN McLEOD, ET AL.,
Defendants-Appellees,

CITY OF EVERETT, EDWARD CONNOLLY,
AND DONALD BONTEMPO,
Defendants-Appellants.

JUDGMENT

Entered: March 30, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgment of the district court holding the City of Everett liable under § 1983 is affirmed.

The cause is remanded to the district court for a redetermination of attorneys' fees.

Costs to appellees.

By the Court:

Francis P. Scigliano

Clerk

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action
No. 84-419-S

SKINNER, D. J.
and a Jury

ROSE BORDONARO, ADMINISTRATRIX OF THE ESTATE OF VINCENT BORDONARO, ET AL

v.

JOHN MCLEOD, ET AL

Sixteenth Day of Trial

APPEARANCES:

Juliane Balliro, Esquire, Joseph J. Balliro, Esquire, Martin K. Leppo, Esquire, Richard I. Clayman, Esquire, Kathleen O'Sullivan, Esquire and Jeffrey Nickelson, Esquire on behalf of the Plaintiffs.

Franklin H. Levy, Esquire, Ralph F. Champa, Jr., Esquire, and Flynn McDonnell, Esquire, on behalf of the Defendants.

Courtroom No. 6
Federal Building
Boston, MA 02109
9:00 a.m., Wednesday
October 28, 1987

Marie L. Cloonan
Federal Court Reporter
1690 U.S.P.O. & Courthouse
Boston, MA 02109 – 426-7086
Mechanical Steno – Transcript by Computer

[JURY INSTRUCTIONS.]

[16-11] Now, taking a look at your special interrogatories, you will see there are two general headings, A and B. One is with reference to claims under the Civil Rights Act, and the second is to claims under Massachusetts General Laws Chapter 258. The case breaks down very cleanly into two divisions. The standards under the Civil Rights Act and the consequences are quite different from those under the Massachusetts General Laws.

The Civil Rights Act that is referenced here provides a right of action, a right to collect damages for violations of constitutional rights where the defendant is acting under color of state law. Now, all of the defendants here — state law means also municipal law in this context, because the City of Everett is an agency, a political subdivision of the Commonwealth of Massachusetts.

"Acting under color of state law" in this context means purporting to act in their official capacity and includes wrongful acts as well as acts that are properly within their official capacity.

One cannot escape the categorization of acting under the color of state law simply because the official acts in excess of his authority. But if he's purporting to act, if he says, I, as mayor, do this, or I, as chief of police, do this, or I am a policeman and I am in my police uniform and I do this and that as a policeman, that satisfies that **[16-12]** requirement.

Now, the constitutional rights that are protected or implemented, vindicated by this statute, are those constitutional rights guaranteed by the Fourteenth Amendment, and the Fourteenth Amendment incorporates, for all practical purposes, present constitutional jurisprudence, most of the first ten, and the rights that are guaranteed are the rights not to be deprived of life, liberty or property without due process of law.

Later on, we will be discussing in the final stages of the trial the allegations of deprivation of property. Right now we are discussing or should be considering deprivation of life and liberty, life with respect to Mr. Bordonaro, and liberty with respect to the other plaintiffs. Liberty in this context includes the right to go about one's business free from unreasonable and excessive interference from police officers. Even persons who have committed crimes have this constitutional right. The police may use only such force as is necessary to enforce the law.

I said at the outset that judgment by default has entered against the principal actors in this scene of carnage at the King Arthur's Motel. That is, McLeod, Aiello, Macauda — I should have these names.

MR. CHAMPA: McClusky, Judge.

THE COURT: — McClusky, and also McFeeley. And **[16-13]** aside from the question of judgment by default, I will instruct you that their conduct in breaking down the door, going in and beating some of these plaintiffs and creating an impact upon some of the women that they didn't actually beat, was without a doubt a gross violation of their constitutional rights. That should be taken as a given in this case. You don't have to be concerned with whether what they did was in violation of constitutional rights. No civilized community, society, even without constitutional protection, could tolerate this kind of unbridled savagery on the part of the police, and certainly where we have constitutional guarantees against overreaching, excessive use of force by our government against ourselves, such conduct is totally illegal, unconstitutional and intolerable.

Your concern this morning and today and whatever amout of time that you take will be to consider whether the other defendants in the case are to be held liable under this Civil Rights law, and the other defendants going up in order of rank,

Sgt. Ferullo, the chief of police, the mayor, and the City of Everett.

The standards to be applied to Ferullo are different from the standards to be applied to the city and the supervising officials. We're dealing with a specific conduct of Ferullo concerning which there is dispute, a contradiction in the evidence, the testimony differs. It will be your **[16-14]** duty, and your duty exclusively, to resolve that conflict in the testimony. That is not within my prerogative.

If anything I say in the course of these instructions suggests that I have one view or the other about the testimony, it is inadvertent and you should disregard it because that's none of my business, that's your sole prerogative and responsibility is to resolve conflicts in the testimony and determine what is more likely to have happened than otherwise, what has been established by a preponderance of the evidence.

How do you go about doing that? The way you have been doing it all your lives, nothing special. You are here because you are experts in your joint experience, you have been determining one way or another who is telling the truth, who is to be believed, who is the most reliable in many, many aspects of your lives.

When you are going to buy a car, when you listen to politicians, when you try to resolve a squabble among your children, or resolve a conflict in the neighborhood, you are doing this all the time. You listen, you listen to the internal consistency of what is said, you compare what is said with the other circumstances which exist. Are they consistent with other things that you think are believable? Does the witness have an interest in distorting? What was the witness's opportunity to observe? What is his capacity **[16-15]** to remember?

You check the tone of voice, you look at the expression on the face, you watch the body English that goes along with the testimony. You use instincts that you have sharpened during the

course of your lives. You are entitled to rely on those instincts as jurors as to what is believable, what constitutes such convincing force as to be embraced as a preponderance of the evidence.

Now, one aspect of the testimony about Ferullo I am going to exclude from your consideration because that is my duty. If certain evidence doesn't rise to the level of law to a preponderance of the evidence, then I'm going to have to exclude that from your consideration.

There was a little bit of evidence concerning Ferullo going back with McLeod in the motel. It is inconsistent with everything else in the case. When the photographer testifies about a long-sleeve shirt with the chevron, and that is all. There is nothing there to corroborate observation made under extremely trying circumstances. Accordingly, you will not deal with that particular testimony in dealing with the liability of Ferullo.

But you do have to deal with Ferullo as a defendant under the Civil Rights Act along these standards: For liability to be imposed, you have to find there was something **[16-16]** more than negligence, that there was a gross default in his duty to the defendants — excuse me, to the plaintiffs of the sort which shocks the conscience. It goes beyond mere carelessness and approaches a deliberate disregard for the constitutional rights of the plaintiffs.

And in coming to this decision, you have to decide whether, as he says, he left the scene before there was any indication of gross breakdown in the conduct of the police, or whether, as you might infer from other testimony, he was there after the matter had gotten well under way, and, as some other witnesses testified, came down the front hall, the front stairs, after all of this carnage had begun, and said, "Frig it, I'm leaving." It's for you to decide which version of events is established by a preponderance of the evidence. Once you've made that conclusion, then you have to make a value judgment as to

whether as a superior officer, a supervising officer, the man in charge, his conduct, which ever way you look at it, constituted such a gross abandonment of his duty as to be shocking to the conscience and subjecting him to liability under the Civil Rights Act.

When we come to the supervising officers in the city, we have a different standard. The city and the supervising officers are liable only if there was a policy or practice, they deliberately chose a policy or practice which you find had a causal connection to the events which occurred **[16-17]** on July 23rd. It is not enough to say, oh, that was bad police administration, that was sloppy, that was a violation of an ordinance or whatever. You have to show that there was a causal relationship, likely causal relationship; that is, the plaintiffs have to persuade you by a preponderance of the evidence that there was a causal relationship between whatever policies were adopted and the harm that the plaintiffs suffered.

What is required under the Supreme Court's rulings in these matters is an affirmative link, an affirmative link between the conduct of the city and its supervising officials and the harm that befell the plaintiffs. When we're talking about supervisory officers and the city, we must follow this guidance from the Supreme Court, and for the benefit of counsel, I'm reading from Pembaur v. the City of Cincinnatti. There's a Supreme Court citation, but I'm reading from 54 Law Week at 4293.

"We hold that municipal liability under Section 1983 attaches where, only where a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."

Now, for purposes of that statement — do you want me to read it again?

"We hold that municipal liability under 1983 **[16-18]** attaches where, and only where a deliberate choice to follow a

course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."

And I instruct you that action within the meaning of this phrase includes non-action. A deliberate choice to follow a course of non-action. If there is an affirmative link to the violation of the plaintiffs' constitutional rights supports liability.

In this particular case, they were dealing with action, but I have no doubt that action includes non-action for purposes of municipal liability. And I so instruct you for purposes of this case.

If the defendant city and its police department had a specifically unconstitutional policy, which was causally connected to the harm suffered by plaintiffs, that would justify imposing liability, would warrant the imposition of liability upon the city and upon the officials responsible for it.

Now, it is for you to decide whether the policy that I'm about to describe existed, but it was testified to by Sgt. Ferullo without, so far as I can recall, any contradiction by the chief of police or anybody else. That is this: That the police department had a policy of routinely breaking down the door in order to arrest a felon, **[16-19]** regardless of whether they had a warrant, even without a warrant, as a standard matter of practice.

I instruct you that as a general matter of practice, this is an unconstitutional policy. The constitution requires that policemen either have a warrant or be faced with what is referred to as exigent circumstances, that is to say, they cannot effectively enforce the law without a violent intrusion into a particular premises.

Exigent circumstances exist where there is a likelihood that evidence may be destroyed. The typical case is a drug case. Somebody is about to flush the cocaine down the toilet, you can

go in, seize it. Or if the felon is about to escape in some way, down the laundry chute and out through the cellar. There is no evidence here, I charge you, of exigent circumstances. There was no evidence to be seized, there was no likelihood that anybody in Room 209 would escape, except out the window at some peril, which could easily have been dealt with with all those policemen by putting a policeman in the back.

Now, if you find that there is an affirmative link between the police policy of routinely breaking down a door to seize somebody suspected of committing a felony and the harm suffered by the plaintiffs, you would be warranted in imposing liability. When I say "imposing liability," I should say to you that "yes" answers to these questions **[16-20]** impose liability on the people referred to and "no" answers do not. That's the policy that's referred to in Interrogatory 2 under A. When I say "caused" in these six interrogatories, I'm talking about whether the policy or the acts complained of were a moving force of the violation, whether there is an affirmative link between the conduct complained of and the harm suffered.

Interrogatory No. 1 deals with the conduct of Sgt. Ferullo, that I have discussed earlier.

Interrogatory No. 3 deals with the potential liability of Chief Bontempo.

If you are satisfied by a preponderance of the evidence that the policy described by Sgt. Ferullo was imposed or permitted to continue by the action of the chief.

There is no evidence from which an inference could be drawn — No. 3 has to do with the liability of the City of Everett for the policies of its police department. No. 3 has to deal with the liability of Chief Bontempo. There is no evidence in the case that the mayor knew anything about this particular policy. It's not clear that he had any such participation that would make him personally liable.

Referring to the liability of the City of Everett, I must digress for a minute, because of reference by counsel to the citizens of Everett as the stockholders of the corporation. That is not really quite right. A city is, in fact, a municipal corporation, but it doesn't have stockholders. It is right, that, of course, a financial liability imposed upon the city may have some impact upon the citizens who eventually will have to cough up the money, one way or the other. If they don't have any benefit of any surplus, they have to come up with it one way or the other.

That's all right, that's what the law permits, it requires, if circumstances are such to make the city liable because these people who run the city — the city doesn't have any existence other than through the people that manage it — they're the representatives, they're the agents, they are chosen by the voters of that particular city, and there is nothing that should shock you or upset you about the notion that liability comes to rest eventually upon the people who made the choice as to how the city was to be run.

The fourth question has to do with the liability of the City of Everett with respect to recruitment, training, supervision, or disciplining of police officers amounting to deliberate indifference to the Civil Rights complainants, gross negligence. And the authorities in this Circuit say that if there is a causal connection, an affirmative link between failure in recruitment, training, and discipline and the conduct of the police, which is the result of gross negligence amounting to deliberate indifference, then the **[16-22]** city may be liable. What is gross negligence amounting to deliberate indifference? The appellate courts generate these phrases in an attempt to guide us, and they have a rhetorical ring to it. It sounds pretty fine. Gross negligence amounting to deliberate indifference. What does it mean? How do we flesh that rhetoric out to give it meaning in a particular case? I can help a little, I think, I hope, but basic-

ally you have to do that. I can't change that, I can't change the standards or alter them. You have to take what I have just said to you and make of it a rule to govern this case and these facts.

I think, perhaps I suggest to you, and you can take this for what it's worth, that if we were to talk about gross indifference amounting to — excuse me, gross negligence amounting to deliberate indifference and we are to talk about it out of this context, out of the formal context of the courtroom, we might put it in terms of somebody just not giving a damn, somebody putting convenience, self-protection, even budgets ahead of the duty imposed to protect and preserve the citizens, the community, and I think I can also say that as a matter of law, the primary duty of the police departments and policemen is to protect and preserve life and property and the public peace. And if the City of Everett, through its supervising people, made a deliberate choice to follow a course of action or non-action which, in effect, translates as "we don't give a damn," then liability would be imposed under this section.

The official language, however, is gross negligence amounting to deliberate indifference, and you don't have to agree with me as to the vernacular translation of that, you can flesh that language out as you see fit.

Question 5 has to do with the same, gross negligence amounting to deliberate indifference with respect to recruitment, training, supervision or discipline, and that has to do with medical exams and training programs and records, so forth, disciplinary hearing.

The fifth one has to do with whether Chief Bontempo conducted himself with gross negligence amounting to deliberate indifference with respect to those subjects.

And the sixth one has to do with the conduct of Mayor Connolly with respect to those subjects, having in mind that ultimate authority, as I understand the testimony for the police force, rested with the mayor acting through the chief.

Well, now, there is still — all these threads go through all of those subdivisions of the case. There is always the burden of proof on the plaintiffs by a preponderance of the evidence. There is always the issue of causation. You can't just stop where the expert stopped. The expert said this wasn't proper practice, this wasn't **[16-24]** proper practice, this, that, and the other thing. You remember all that. But he did not testify on causation, on the causal connection. You may recall that I asked him if there were any studies, if he had made any studies, and he said no, so that that is not a subject of expert testimony that you can rely on in making a conclusion about causation.

With respect to the recruitment, training, supervision and discipline, you are, however, entitled to draw inferences to arrive at conclusions from the circumstances based upon common sense, logic, and your own experience.

If you conclude on the basis of the evidence that, first of all, that the failure to meet the standards referred to by the expert were the result of gross negligence amounting to deliberate indifference, then you can consider whether, if the chief and the city and the mayor had behaved in accordance with those things, whether it would have been likely that this catastrophic event would not have occurred.

You can consider, you can draw on your own experience in life as to whether a group that is instilled with a sense of professionalism and accountability is more or less likely to break the traces, flip out, whatever it was that happened. Whether, if supervisory officers had been properly trained, they would have intervened, they would have recognized the situation as the experts have, as being a **[16-25]** potentially explosive one, demanding supervisory intervention. That's for you to decide. As I say, you have to be persuaded by a preponderance of the evidence, you have to be persuaded that the conduct of the chief, the mayor, the city was grossly negligent, amounting to deliberate indifference.

Before I leave that subject, I want to check through some of the requests of counsel and some of my notes.

(Pause.)

I think I have referred to the duty of a supervising officer to control the officers under his command. That would be something for you to consider under the first question.

When we're talking about the liability of the city and its supervisors, knowledge of a pattern or practice of unconstitutional violation or condition or the existence of facts which foreseeably create the likelihood for violations which are disregarded by the supervisor in a grossly negligent manner, also subject the superior of the city for liability for failure to correct the situation.

You may consider also violations by the mayor and chief of duties imposed by statute or ordinance in considering whether they've acted in a manner which was grossly negligent amounting to deliberate indifference.

There are a few further general statements before I **[16-26]** get into the second branch of the case that I would like to make to you about witnesses. You may consider prior inconsistent statements of a witness in determining what weight you will give to his testimony. And you may consider deposition testimony, just as you would if the witness were here.

You will recall that part of the key testimony, that I recall, at least, about the events of July 23rd, came through the deposition of Farris — Was it Ferris or Farris? — who was the guard, the security guard at the warehouse next door or across the line in Everett. That was by deposition, which he describes McLeod coming to him and the telephone call and the cruiser arriving. I won't go through the whole thing, but that was all described to you, including McLeod's statement to the effect that he was going to get these so-and-so. That deposition testimony is subject to the same scrutiny and the same test with the exception that you can't look at the witness, so it makes

it harder, perhaps, to make a determination about veracity and reliability, but there has been no contradiction to his testimony, so perhaps that makes it easy.

You are not obliged to believe uncontradicted testimony. All testimony is subject to your scrutiny. You are testing.

There's nothing magic about an expert, either. **[16-27]** An expert's testimony is subject to testing, to scrutiny, to a determination that he really is an expert, that he really knows what he is saying and what he is talking about are generally accepted standards and not some idiosyncratic views of his own; and that's for you to decide, and it is for you to decide to what extent the standards that he enunciates are standards which should have been applied to the Everett Police Department. That is essential in determining — Excuse me, it is essential to your determination of whether the conduct of the defendants who remain in the case constituted a violation of the Civil Rights Act.

Now, I'm going to turn to the second branch of the case, which is the plaintiffs' claims under Chapter 258 of the Massachusetts General Laws. Chapter 258 of the General Laws of Massachusetts imposes liability of a certain sort on cities and towns. This has to do with the liability of the City of Everett, and it runs counter to 1983. It imposes liability for the very things that are not a basis of liability in 1983 and excludes the very things that are. This seems a little surprising unless you put it in its historical context.

Under the Massachusetts law and under the law of most states, until this past decade or so, cities and towns have been immune from liability, with a few exceptions. You could sue a city for potholes in the street, and so on, but, **[16-28]** generally speaking, cities and towns were not liable for the conduct of their employees. Your legislature determined to make a modest change in this rule by enacting Chapter 258. Chapter 258 makes the city liable for the negligence of its employees.

You recall that I said that negligence was not enough under 1983. Well, negligence is the gist of liability, the basis for liability under Chapter 258. The statute excludes deliberate intentional wrongs perpetrated by municipal officers. The city is not liable under Chapter 258 for deliberate wrongful acts by its employees. It is not liable also for discriminatory conduct. The very kind of major policy judgment which may make a city liable under Section 1983 is specifically excluded. I think, perhaps, I would like to read the statute itself, and it is sitting on my desk, Chapter 258. I guess I ran out of arm space when I came in this morning.

(Whereupon the law clerk leaves the courtroom to retrieve the volume for the Court.)

"Liability is excluded when a public employee is acting in — is exercising due care in the institution of the statute." Due care is the opposite of negligence. Negligence is defined as the absence of due care. Liability is for the negligence, negligent conduct of the employees. Also excluded is a claim based upon the exercise of **[16-29]** performance or the failure to exercise or perform a discretionary function.

Now, discretionary functions are such that there's no legal obligation on the part of the official to go one way or the other. It is just as well justified going one way as the other. He has a free choice to make, as a matter of policy, he is given the right to make a policy choice. The type of decisions for which a claim may be made under this statute is the type of decision that is required by law.

If a defendant is negligent, that is, careless in making a decision that is required by law, then there is liability under this section.

There is an exception for any claim arising out of an intentional tort, including assault and battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, invasion of privacy and a bunch of other things.

That means that the city is not liable under this section for the conduct of McLeod, Macauda, Aiello — I don't know why I block these other names, but the active participants in this invasion. I had that list in front of me — McFeeley and the fellow who fired the gun.

MR. CHAMPA: McClusky.

THE COURT: McClusky.

[16-30] So the city can't be tagged for their conduct under this statute.

So we look to negligence. Who is likely to have been negligent? And your final interrogatory asks: Was the harm suffered by the plaintiffs directly caused by the negligent nondiscriminatory acts or omissions of any of the following persons: Connolly, Bontempo, Baker — this is the first time, now, that you've had to deal with Baker — and Ferullo. And you see here that I have said "directly caused" in this question and just "caused" in the other questions.

The causal connection, I suggest to you under Chapter 258, has to be more direct or proximate, is the lawyers' phrase for it, than the causal connection under 1983, which calls for an affirmative link. Direct or proximate cause means that there was a direct line, there was no intervening cause, there was a direct line between what was done and the harm suffered; and we go back, again, with reference to Ferullo, to his conduct, if you believe Ferullo that he left early, you can consider whether even if that was not gross negligence or a deliberate disregard of constitutional rights, that it was carelessness, a failure to use due care for the safety of the plaintiffs.

The same with respect to Lt. Baker, whether it was negligence on his part, given the nature of the call that came in and continuing to come in, the calls continued to **[16-31]** come in, whether it was negligent on his part to remain in the station, whether if he had gone down to the scene, that would have been likely to have prevented the carnage which occurred.

Bontempo and Connolly, we are dealing, again, with training, supervision and recruitment, whether even if there was not gross negligence, whether they were careless.

Have in mind that if you have given a "yes" answer to the same type of question under Category A, that's inconsistent with a "yes" answer under Category B, because, as I've said, Chapter 258 is the reverse side of Chapter 1983. It excludes the kind of deliberate conduct which, or gross negligence amounting to deliberate conduct which produces liability under 1983 and imposes negligence, liability for negligence, rather, for which no liability is imposed under 1983, so it is the other side of the coin.

Well, now, because this case is so long, I'm just going to go through and recite the names of the witnesses just to see if I can recall the case to you. It is sort of a dull exercise, but it may be useful.

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action
No. 84-419-S

SKINNER, D. J.
and a Jury

ROSE BORDONARO, ADMINISTRATRIX OF THE ESTATE OF VINCENT BORDONARO, ET AL.,

v.

JOHN McLEOD, ET AL.,

Fourth Day of Trial

APPEARANCES:

Juliane Balliro, Esquire, Joseph J. Balliro, Esquire, Martin K. Leppo, Esquire, Richard I. Clayman, Esquire, Kathleen O'Sullivan, Esquire and Jeffrey Nickelson, Esquire on behalf of the Plaintiffs.

Franklin H. Levy, Esquire, Ralph F. Champa, Jr., Esquire, and Flynn McDonnell, Esquire, on behalf of the Defendants.

Courtroom No. 6
Federal Building
Boston, MA 02109
9:00 a.m., Thursday
October 1, 1987

Marie L. Cloonan
Federal Court Reporter
1690 U.S.P.O. & Courthouse
Boston, MA 02109 – 426-7086
Mechanical Steno – Transcript by Computer

[Direct Examination of Defendant Carl A. Ferullo, Everett Police Department by Mr. Balliro on behalf of Plaintiffs, Fourth Day of Trial, October 1, 1987, Volume 4, page 169:]

Q. So in hindsight, afterwards, you still felt you did the right thing?
A. Yes, I did.
Q. To this day, Lieutenant, you feel that you did the right thing?
A. I would have to think about it.
Q. Well, when you think about it, doesn't it occur to you, sir, if you'd stayed there and taken control that Mr. Bordonaro would be alive, do you think about that?

MR. LEVY: I object.

MR. CHAMPA: I object, that is argumentative.

THE COURT: The question is an appropriate question. I just as soon you not shout at the witness.

MR. BALLIRO: I'm sorry, your Honor.

THE COURT: Answer, the question.

A. If I stayed there, it might have been different, is that the question?
Q. That Mr. Bordonaro might be alive?
A. I don't think it would be any different. I could never predict what was going to happen there. I had been to 50, 60 things like this and there was never a problem in the past.
Q. Tell me one of the last 50 or 60 things you had been to where there were 13 or 14 people inside the room where your men had shot, the Everett Police Officers had shot into a room and that police officers had then gone in and beat somebody to death and beat other people, when is the last time?

MR. LEVY: I object, your Honor.

MR. CHAMPA: Objection.

THE COURT: Sustained.

Q. You said you had been to 50 or 60 things like that?
A. Where doors had been kicked in, yes, over the last 24 years, yes.

[Cross Examination of Defendant Carl A. Ferullo by his counsel, Volume 4, page 234:]

Q. Does the City of Everett have any device used to gain entry into a room or through a door?
A. We have a 12-pound sledgehammer which we use to break doors down.
Q. Have you conducted any raids, yourself, personally, when you used this instrument?
A. Yes. I have.
Q. You have had to break down doors forcefully?
A. Yes, sir.
Q. When is the last time you had to breakdown a door?
A. Several years, I would say eight or ten years on a search warrant.
Q. When you went there in response to the call, did you expect that there would be anything that would happen that did, in fact, happen?
A. No. I had no premunition [*sic*] of what was going to happen; I had no idea of what was going to happen.

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

C. A. 84-419-S – SKINNER, D. J.
and a Jury

ROSE BORDONARO, ADMINISTRATRIX OF THE ESTATE OF VINCENT BORDONARO, ET AL.,

v.

JOHN McLEOD, ET AL.,

FIFTH DAY

APPEARANCES:

Joseph J. Balliro, Esquire, Julianne Balliro, Esquire; Martin K. Leppo, Esquire, Richard I. Clayman, Esquire, Kathleen O'Sullivan, Esquire. On behalf of the Plaintiffs.

Franklin H. Levy, Esquire, Ralph Champa, Esquire, Flynn McDonald, Esquire. On behalf of the Defendants.

Courtroom No. 6
Federal Building
Boston, MA 02109
9:25 a.m., Friday
October 2, 1987

Lisa McDonald
Registered Professional Reporter
162 Lebanon Street
Malden, MA 02148 – 321-6348
Mechanical Steno – Transcript by Computer

[Cross-Examination of Defendant Carl A. Ferullo by Mr. Levy on behalf of Defendants, City of Everett, et al., on Fifth Day of Trial, October 2, 1987, Volume 5, page 32:]

Q. Now, is it legal within the Commonwealth of Massachusetts for policemen, as far as you know, to break down doors to effect an arrest?
A. Yes, it is.
Q. And what are the rules, I mean, what are the circumstances when can you break down a door?
A. Well, there are several times a door can be broken. We can get a search warrant. It's a no-knock search warrant which would give us the authority to break down the door to get in, if people inside could have something they could dispose of it. If you're chasing a fleeing felon, which that was the case of the King Arthur, and you know you have — have reason to believe they're inside, they refuse to open the door, then you can break the door to get in there.
Q. How many times prior to this night have you been on the scene of a police action where doors were being broken down?
A. I can only guess. I would say probably about 20 or 30.
Q. That was over the years?
A. Especially during the 60s and 70s, during the course of the drug years, that's correct, sir.
Q. And in breaking down the doors, what do you use, an axe?
A. Well, we have a 12-pound sledge hammer, but whatever way the door will come down. Sometimes you can just kick it open.
Q. So whatever force was necessary to take the door down?
A. That's correct, sir.

[Re-Direct Examination of Defendant Carl R. Ferullo by Mr. Balliro, on behalf of Plaintiffs, Vol. 5, page 54:]

Q. Now, sir, in response to a question by Mr. Levy, you gave a definition of a force that could be used in pursuit of a fleeing felon, do you recall that?

A. That's correct, sir.

Q. And you said whatever force was necessary to get the door down could be utilized, that's how much force they could use in pursuit of a fleeing felon, is that right?

A. To effect an arrest, that's right.

Q. And that's your definition?

A. That's — yes, that's the way we've always applied it, yes.

Q. So there's no confusion about it —

MR. CHAMPA: Objection, Judge, just remarks by Mr. Balliro "so there's no confusion."

THE COURT: Just a question, Mr. Balliro.

Q. Give us, if you will, your entire definition of what force can be used with respect to pursuit of a fleeing felon.

A. A fleeing felon can be pursued, if he goes into a room and refuses to open a door, we know or we have probable cause to believe he's in the room, we can break the door to go in and effect an arrest, and once we effect arrest we can meet as much power to overcome the amount of power or struggle that he gives. We can use, I believe, a reasonable amount of force to overcome the force that you're confronted with.

Q.. All right. That's your definition of how much force that could be used?

A. Yes.

Q. You don't want to add anything to that definition?

A. No, I don't believe so. We use the amount of force — the same amount of force that we're confronted with, if somebody, if they go easy and we can cuff them with no problem,

then there's no problem. If they fight, we have to use as much force to counteract the force that he's giving us. No more, no less. Just the force that's absolutely necessary to effect an arrest.

[Redirect Examination of Defendant Carl A. Ferullo, by Mr. Leppo on behalf of Plaintiffs, Vol. 5, page 76:]

A. Commonwealth versus Ford. I read the decision.
Q. What was the name of it again?
A. Commonwealth versus Ford. You talking about rights of arrest. I'm sorry.
Q. I'm talking about the rights of arrest, sir, what a police officer can do to effectuate an arrest.
A. That came basically from the Blue Book and from —
Q. Did you read any Supreme Judicial Court Decisions on what a police officer can do —

MR. CHAMPA: Objection, Your Honor.
MR. LEVY: Objection.
MR. CHAMPA: As to relevancy.
THE COURT: Sustained.

Q. Just one last question, Lieutenant. So it's your opinion that if you remained on the scene that you would have done the same thing that the officers did by breaking down that door with hatchets and sticks and everything else, is that what you're telling us?
A. I'd like to clarify that. I would go — if I had to effect an arrest on a felon that I knew I had probable cause that was behind the door, I would break that door down if he refused to let me in. I would not probably go crazy when I got inside. I would have broken the door down and I would have been within the rights of the Commonwealth to do it.

Q. And you would have done the same thing that the officers did by getting axes and other pieces of metal in order to remove that door from their hinges?

A. I don't know that I would do that. I know that I would do everything I could to break the door down. Short of shooting, I would never shoot through the door, but I would try to get the door down in every way I possible could.

Q. And knowing that there were other people in the room, other than who you thought was in there, and you didn't know if there were women or children in the room, you would have done the same thing.

A. I would have broken the door down. By breaking the door down there wouldn't have been injury to the people in the room. I don't know what happened when the door came down. But as far as the breaking the door down, it was justified.

Supreme Court, U.S.
FILED
JUL 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2036

In The

Supreme Court of the United States

October Term, 1988

CITY OF EVERETT, ET AL.,

Petitioners,

v.

ROSE BORDANARO, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH J. BALLIRO*
JULIANE BALLIRO
BALLIRO, MONDANO & BALLIRO, P.C.
Three Arlington Street
Boston, MA 02116
(617) 227-5822

MARTIN K. LEPPO*
LEPPO & TRAINI
490 North Main Street
Randolph, MA 02368
(617) 961-3344

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

Supplemental Statement of the Case 1

Reasons for Denying the Writ 5

I. THIS CASE DOES NOT PRESENT AN APPROPRIATE OPPORTUNITY TO DEFINE A "CUSTOM" UPON WHICH MUNICIPAL LIABILITY MAY BE BASED 7

II. THE COURT OF APPEALS DECISION APPROPRIATELY APPLIED THE PRECEDENT OF THIS COURT ON THE QUESTION OF CAUSATION 10

III. THE DELIBERATE INDIFFERENCE STANDARD DOES NOT REQUIRE PROOF OF A PATTERN OF PRIOR MISCONDUCT BUT A DELIBERATE OR CONSCIOUS CHOICE BY POLICYMAKERS FROM AMONG VARIOUS ALTERNATIVES 13

IV. PUNITIVE DAMAGES WERE PROPERLY AWARDED AGAINST THE MUNICIPAL OFFICIALS BASED UPON A RECKLESS OR CALLOUS INDIFFERENCE TO FEDERALLY PROTECTED RIGHTS 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 7

Bennett v. Slidell, 728 F.2d 762 (5th Cir. 1984) 9

Canton v. Harris, ___ U.S. ___, 109 S.Ct. 1197 (1989) 8, 10, 13

Fundiller v. Cooper City, 777 F.2d 1436 (11th Cir. 1985) 9

Gilmere v. Atlanta, 737 F.2d 894 (11th Cir. 1984) 7, 8, 9

Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981) 9

Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978) 7, 10

National Labor Relations Board v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 5

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 10

Pembaur v. City of Cincinnatti, 475 U.S. 469 (1986) 13

Penzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S. Ct. 1519 (1987) 5

Polk County v. Dodson, 454 U.S. 312 (1981) 10

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 6

Smith v. Wade, 461 U.S. 30 (1983) 15

Spell v. McDaniel, 824 F.2d 1380 (4th Cir.), cert. denied, 108 S.Ct. 752 (1988) 8, 9

St. Louis v. Praprotnik, 485 U.S. 112 (1988) 7

TABLE OF AUTHORITIES – Continued

Page

Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985) cert. denied, 474 U.S. 1100 (1986) 8, 9

Webster v. Houston, 735 F.2d 838 (5th Cir. 1984) 9

COURT RULES:

Federal Rule of Civil Procedure 51 11

SUPPLEMENTAL STATEMENT OF THE CASE

The petitioners were found liable upon two separate theories; first, the existence of a facially unconstitutional custom or practice that permitted police officers to break down doors to arrest fleeing felons in violation of constitutional protections against unlawful searches and seizures, and, second, a policy of deliberate indifference in the recruitment, training, supervision and discipline of Everett police officers.[1]

Evidence of municipal and official liability, beyond evidence of the incident itself, was abundant. With respect to the above-described facially unconstitutional practice, the evidence revealed 50 or 60 prior occasions where doors had been broken down by Everett Police Officers and approximately 20 to 30 such incidents where whatever force was necessary to break down doors to gain entry was utilized (A9).* City of Everett Police Sergeant Carl Ferullo (hereinafter the "Sergeant") testified that the practice of breaking down doors in pursuit of fleeing felons under circumstances such as those presented here was a practice always applied in the City of Everett Police Department (A9). (See also Trial Transcript, Volume 5, Page 43, Testimony of Carl Ferullo).

---

[1] The City and the Chief were found liable under both theories. The Mayor was found liable under the latter theory, the only theory submitted to the jury as it pertained to the Mayor.

* (A___) refers to the appendix attached to the Petition for Writ of Certiorari. Many of the facts set forth here are contained in the First Circuit opinion.

In the years preceding this event, City of Everett Police Chief Donald Bontempo (hereinafter "Chief") utilized an extensive report review process through which he monitored the conduct of his officers on a daily basis and was alerted to practices that violated department policy (A11). Subsequent to this incident the Chief, having been briefed regarding the nature of this incident, announced over the televised media that his officers were acting within the performance of their duties (R. 9-128).[2]

The evidence also revealed that the City of Everett Police Department operated under a wholly deficient set of rules and regulations promulgated in 1951 and last distributed to the officers in the mid-sixties (A16). The rules and regulations, which comprised the department's day-to-day guidelines, failed to address contemporary law enforcement standards, including those governing search and seizure, hot pursuit, and the use of deadly force (A16).

Everett officers lacked necessary, important and current training in many police procedures, including the proper use of force. Officers were discouraged from pursuing supplementary training courses and were forced to sue the City for statutorily mandated benefits earned through the successful completion of college law enforcement courses (A17). Supervisory officers lacked the basic training due all officers and the command training necessary to effectively supervise and operate a police force (A17).

---

[2] Trial Transcript, Volume 9, page 128, Testimony of Donald Bontempo.

The evidence demonstrated that in the years prior to this incident, the Chief and Mayor Edward Connolly (hereinafter "Mayor") had been bombarded with oral and written requests for additional training and organizational improvements (A18). Both the Mayor and the Chief had received complaints from Everett officers concerning inadequate police training and the dangers that this presented to civilians, had discussed the issue and its consequences and had determined that no more training would be provided (A18). Subsequent requests for improved training by Everett police officers were likewise ignored (A18).

Prior to this incident Lieutenant Stewart, an ardent advocate for improved training, supervision and control among the Everett officers, informed both the Mayor and the Chief that something terrible would happen if more instruction were not provided to the police force (A18). Upon his later retirement, the Chief advised Stewart that he did him a big favor and discarded his memos (R. 11-100).[3] Those memos dealt with guidelines, policies, and training (R. 11-102).[4]

The Chief of Police failed to make written, monthly reports to the Mayor concerning the department, as was required by city ordinance, and violated a city ordinance

---

[3] Trial Transcript, Volume 11, Page 100, Testimony of Lieutenant George Stewart.

[4] Trial Transcript, Volume 11, Page 102, Testimony of Lieutenant George Stewart.

by failing to submit police recruits to required psychological examinations (A17). Background checks of prospective officers, which are the best indication of future performance, were superficial, at best, and failed to reach minimal levels of acceptability (A17).

In the past, discipline had been meted out haphazardly, inconsistently, and infrequently to Everett officers (A18). The Mayor and the Chief were aware of the acts perpetrated here yet chose to take no disciplinary actions against the officers until they had been indicted (A21). A full, internal investigation by the Everett Police Department did not occur until over one year after the incident (A18).

Ferullo's short suspension was subsequently overturned on appeal, based in part, on the fact that he had received inadequate supervisory training for the position of Sergeant (A18).[5]

The police department lacked sufficient guidelines and placed too much discretion at all operating levels (A17). The review of civilian complaints for police misconduct fell well below accepted levels. Many complaints were placed in a dead letter drawer never to be seen again (A18).

The Chief testified that accountability of police officers was handled in the same manner prior and

---

[5] Ferullo testified at Volume 4, Pages 157-158, that the Chief told him, "The Mayor felt that the brass should take a part of the blame for this." Ferullo was suspended for a period of four days.

subsequent to this event.[6] In a 1983 letter concerning an officer's misconduct, the Chief wrote: "Gone are the days when accountability is scoffed at." (A18)

REASONS FOR DENYING THE WRIT

Certiorari is granted only in cases involving issues of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the courts of appeals *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S.Ct. 453 (1951). The asserted impact of the judgment on the treasury of the City of Everett and its taxpayers is not an appropriate basis upon which the petition should be granted. See *Penzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519 (1987) (Blackmun, J., concurring).

Moreover, the budgetary and financial resource descriptions contained on pages 10 and 11 of the petition should be stricken as improper and irrelevant to a determination of the issues before the Court.[7]

---

[6] Trial transcript Volume X, Page 114, Testimony of Donald Bontempo.

[7] Earlier in these proceedings the City asserted that it had both the ability and the intention to pay the judgment in full upon entry of final judgment. The current Mayor and City Treasurer each filed affidavits with the First Circuit in connection with a bid to obtain a stay pending appeal without posting

(Continued on following page)

" 'Special and important reasons' which may justify the grant of a writ of certiorari imply a reach to a problem beyond the academic or the episodic; this is especially true where the issues involved reach constitutional dimensions, for then there comes in to play regard for the Court's duty to avoid decision of constitutional issues unless avoidance become evasion." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S.Ct. 614 (1955).

Here, the decision of the Court of Appeals for the First Circuit fairly echoes the standards of custom, causation and fault already articulated by this Court pertaining to municipal and official liability and is limited in scope to an application of the outrageous facts of this case to those well established standards. Application of the facts here to the standards urged by the petitioners would push the principles of municipal and official liability to the precipice of extinction.

As no real or embarassing conflict of opinion exists among the circuits on the issues raised by this petition, certiorari on those grounds should likewise be denied.

(Continued from previous page)

the required supersedeas bond. In his affidavit, Mayor McCarthy attested to the City's "sound financial condition." City Treasurer Frank Lewis attested to the City's ability to pay the judgment by three alternative methods and asserted that the method selected was, "a matter of planning and the selection of policy alternatives."

I.

THIS CASE DOES NOT PRESENT AN APPROPRIATE OPPORTUNITY TO DEFINE A "CUSTOM" UPON WHICH MUNICIPAL LIABILITY MAY BE BASED.

This court has already determined that a municipality may be held liable for violations that directly result from unconstitutional customs or practices and also for a failure to adequately train where that failure amounts to a deliberate indifference to the need for such training *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978); *Canton* v. *Harris*, ___ U.S. ___, 109 S.Ct. 1197 (1989). This Court has also defined the term "custom" for purposes of assessing municipal liability as, " . . . the existence of a widespread practice that, although not authorized by written law or express policy, is so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970); *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 691 (1978). More recently, in *St. Louis* v. *Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 927 (1988), this Court implied that municipal liability could attach, " . . . if a series of decisions by a subordinate official manifested a 'custom or usage' of which the supervisor must have been aware . . . "

The petitioners, citing *Gilmere* v. *Atlanta*, 737 F.2d 894, 902 (11th Cir. 1984), urge this court to depart from the principles of *Adickes* and *Praprotnik* and adopt a more stringent standard that would permit, under circumstances such as those presented here, a finding of municipal liability only where a policymaker creates,

establishes, or has direct personal knowledge of a municipal custom. Thus, proof of the continued persistence of a practice or custom, facially unconstitutional or otherwise, would not suffice to establish municipal liability, in the petitioners' view, even if the policymaking officials should have known of the custom and the likelihood of constitutional violations, yet did nothing to curtail it. The exclusion of the principle of "constructive knowledge" would virtually preclude the imposition of municipal liability based upon non-action, a result that is clearly at odds with this Court's recent decisions and the uniform position of the circuits on this issue. See *Canton* v. *Harris*, U.S. ___, 109 S.Ct. 1197, 103 L.Ed. 2d 412, 431 (1989) (O'Connor, J., concurring).

Despite petitioners' contention, a careful review of *Gilmere, supra* and the opinions of other circuits deciding this issue reveals no clear division of authority regarding the standards or quantum of proof to be applied. Here, the First Circuit applied the principles enunciated in *Spell* v. *McDaniel*, 824 F.2d 1380, 1386-88 (4th Cir.), cert denied, 108 S.Ct. 752 (1988) and *Voutour* v. *Vitale*, 761 F.2d 812, 820 (1st Cir. 1985), cert. denied, 474 U.S. 1100 (1986), in concluding that, in order for a custom or practice to be attributable to a municipality, "it must be so well settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice (A8). *Gilmere* would permit a finding of liability where a policymaker makes, establishes, approves of, or encourages the custom or practice, id. at 902. Additionally,

knowledge, whether actual or constructive, of a widespread or persistent custom or practice has been uniformly required by the circuits deciding this issue. *Spell* v. *McDaniel*, 824 F.2d 1380, 1386-88 (4th Cir.), cert. denied, 108 S.Ct. 752 (1988); *Voutour* v. *Vitale*, 761 F.2d 812, 820 (1st Cir. 1985), cert. denied, 474 U.S. 1100 (1986); *Gilmere* v. *Atlanta*, 737 F.2d 894, 902 (11th Cir. 1984); *Herrera* v. *Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981); *Fundiller* v. *Cooper City*, 777 F.2d 1436, 1442 (11th Cir. 1985); *Webster* v. *Houston*, 735 F.2d 838 (5th Cir. 1984); *Bennett v. Slidell*, 728 F.2d 762, 768 (5th Cir. 1984).

Despite the manner in which the issue is presented, what the petitioners really seek is a review of the legal sufficiency of the evidence presented here in support of the custom alleged. Yet, the outrageous facts of this case do not provide this Court with a workable blueprint from which the limits of municipal liability should be defined or with a solid footing upon which to apply a more stringent standard of proof where a "custom" as opposed to a "policy" is alleged.

The Sergeant's testimony was uncontradicted by both the Mayor and the Chief and neither denied a knowledge of the practice as it was described. Instead, the Chief testified that he kept abreast of the actions of his police officers by reviewing all police reports for departures from accepted policy and procedure. Those reports were then forwarded directly to the Mayor for his review on a daily basis. There was no evidence that the Mayor or the Chief took any steps to curtail the practice after review of the reports.

Finally, the Chief expressly condoned and ratified the conduct engaged in here when he announced over the televised media that his officers were acting within the performance of their duties.

Given the evidence presented here, the jury was well warranted in concluding that the custom here went well beyond one lower level employee's mistaken view of the law.[8]

II.

THE COURT OF APPEALS DECISION APPROPRIATELY APPLIED THE PRECEDENT OF THIS COURT ON THE QUESTION OF CAUSATION.

Contrary to the petitioners' claim, the First Circuit did not take an approach that permitted recovery on the basis that the policies and custom alleged merely facilitated the unconstitutional conduct that occurred here.

Citing *Canton* v. *Harris*, ___ U.S. ___, 109 S.Ct. 1197 (1989), *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 105 S.Ct. 2427 (1985), *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), and *Polk County* v. *Dodson*, 454 U.S. 312 (1981), the First Circuit ruled that a plaintiff seeking to impose municipal liability must prove a direct causal

---

[8] Petitioners assert that the evidence merely demonstrated Ferullo's mistaken view of the law as it existed prior to 1975. Of course, the evidence also demonstrated that Ferullo received no training regarding changes in the relevant laws even when he assumed the position of sergeant. Petitioners should not be permitted to take refuge in Ferullo's incompetence, particularly where that incompetence was as the result of inadequate training by the petitioners.

connection between the conduct alleged and the injuries suffered and must establish that the municipal policy is affirmatively linked to and the moving force behind the constitutional violation (A21-A22). The Court then held that the trial judge's instruction properly apprised the jury of the above stated standard.[9]

The petitioners now contend that the Court's use of the word "an" in describing the necessary link as "an affirmative link" and the word "a" in describing the term "a moving force" permitted the imposition of liability if the policy or custom merely formed a link in the chain that led to the constitutional violation. However, since there was no objection to the Court's use of the terms "a moving force" and "an affirmative link", the petitioners have failed to properly preserve the issue and the petition on this ground should be denied.

Rule 51, Federal Rules of Civil Procedure is clear:

> [n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection.

Even assuming the issue was properly preserved, this jury was not instructed, and the First Circuit did not hold, that liability could be found if the conduct was merely a substantial factor in bringing about the harm or if the conduct set in motion a chain of events that led to the ultimate harm. Here again the petitioners' quarrel, not with the court's articulation of the standard, but with

---

[9] The court's instruction on causation is set forth in the Petitioners' appendix at A44-46.

its conclusion that the court's instruction and testimony presented was sufficient to meet that standard.

The petitioners' claim that a proper analysis of the causation issue requires consideration of training, recruitment, supervision and discipline as separate and distinct bases for liability ignores both the nature of the evidence presented here and the facts of the incident itself. The petitioners have continually declined to acknowledge that any significance could properly attach to the fact that these unconscionable acts of violence were perpetrated by, or in the company of, the entire evening patrol force of the police department all acting in unison and beyond the city limits. This case did not present an example of one or more isolated, defective policies. This case presented an example of the consequences that inevitably result from the continued operation of a police department that was pathetically flawed in virtually every aspect of its existence. This was a department where discipline, supervision and training were virtually nonexistent, where accountability was scoffed at and where this unspeakable conduct was later condoned by the Chief when he publicly announced that his men had acted in the performance of their duties as police officers. The record is replete with evidence of a pervasive, persistent and deliberate indifference on the part of the Mayor and Chief with respect to virtually every aspect of the department's operation.

The record in this case supports the First Circuit's resolution of the question presented here. Since the appropriate standards were applied and since the position urged by petitioners would preclude a finding of

municipal liability even in those instances where the policies alleged are a moving force of, and affirmatively linked to, the harm suffered the petition should be denied on this ground.

III.

THE DELIBERATE INDIFFERENCE STANDARD DOES NOT REQUIRE PROOF OF A PATTERN OF PRIOR MISCONDUCT BUT A DELIBERATE OR CONSCIOUS CHOICE BY POLICYMAKERS FROM AMONG VARIOUS ALTERNATIVES.

In *Canton* v. *Harris*, ___ U.S. ___, 109 S.Ct. 1197, 103 L.Ed.2d 412, 427 (1989), this Court recently disposed of the petitioners' claim that the deliberate indifference standard requires proof of a pattern of misconduct before municipal liability may attach based upon a failure to train. The lack of training at issue here, in and of itself, evidences a deliberate indifference to constitutional rights since the need for relevant training was so obvious that the inadequacy was extremely likely to result in the violation of constitutional rights.[10]

The record is also replete with evidence of a lack of minimally acceptable standards in the areas of supervision, discipline and control. In light of the duties assigned to these police officers, the need for supervision,

---

[10] The jury in this case was instructed to apply the "deliberate indifference" standard and was twice read this Court's plurality holding in *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 483-84, 106 S.Ct. 1292 (1986). This portion of the instruction, is set forth on pages A44-A45 of the petition.

discipline and control was also so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the Mayor and Chief can be said to have been deliberately indifferent to the need.

The testimony of the Sergeant and the police expert also provided an ample basis upon which a jury could conclude that the Everett Police so often violated constitutional rights that the need for additional training, supervision, discipline and control must have been plainly obvious to the city policymakers. The plainly obvious need for additional training was also demonstrated by the continuous pre-incident requests and warnings that were deliberately disregarded by both the Mayor and the Chief.

IV.

PUNITIVE DAMAGES WERE PROPERLY AWARDED AGAINST THE MUNICIPAL OFFICIALS BASED UPON A RECKLESS OR CALLOUS INDIFFERENCE TO FEDERALLY PROTECTED RIGHTS.

Contrary to the petitioners' claim, punitive damages were not awarded here merely based upon the assumptions that they should have known of the department's failures. The First Circuit is clear in holding that punitive damages were warranted based upon evidence of the Mayor and Chief's reckless or callous indifference to the federally protected rights of others. A punitive damage award does not require that the city officials themselves

wield the instruments of destruction. A reckless or callous indifference to the rights of others was clearly demonstrated by the manner in which the Mayor and the Chief operated, or failed to operate this police department. Thus, the punitive damage award here falls well within the parameters of *Smith* v. *Wade*, 461 U.S. 30, 56 (1983).

CONCLUSION

For the reasons stated above, the respondents request that this Honorable Court deny the petition for a writ of certiorari.

Respectfully Submitted,

Joseph J. Balliro
Juliane Balliro*
Balliro, Mondano & Balliro, P.C.
Three Arlington Street
Boston, MA 02116
(617) 227-5822

Martin K. Leppo
Leppo & Traini
490 North Main Street
Randolph, MA 02368
(617) 961-3344

*Application for admission pending

Supreme Court, U.S.
FILED
JUL 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2036.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988.

CITY OF EVERETT, ET AL.,
Petitioners,
v.

ROSE BORDANARO, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

IRA H. ZALEZNIK,*
LEWIN & ROSENTHAL,
The Pilot House,
Lewis Wharf,
Boston, Massachusetts 02110.
(617) 227-9400

**Counsel of Record*

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

Table of Contents.

Argument 1

I. Everett's objection to the jury charge on the causation issue was properly preserved in the District Court 1

II. Bordanaro distorted the evidence in the record of Everett's alleged custom of breaking down doors to effect felony arrests and prior incidents of police misconduct 3

Conclusion 5

Table of Authorities.

Cases.

Bordanaro v. McLeod, 871 F.2d 1151 (1st Cir. 1989) 2n, 4, 5

Memphis Community School District v. Stachura, 477 U.S. 299 (1986) 3

Palmer v. Hoffman, 318 U.S. 109, 119 (1943) 3

Rules.

Federal Rule of Civil Procedure 51 3

No. 88-2036.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988.

CITY OF EVERETT, ET AL.,
Petitioners,
v.
ROSE BORDANARO, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

Argument.

I. EVERETT'S OBJECTION TO THE JURY CHARGE ON THE CAUSATION ISSUE WAS PROPERLY PRESERVED IN THE DISTRICT COURT.

In their brief in opposition, Respondents Rose Bordanaro et al., (hereafter to be referred to collectively as "Bordanaro") claimed that Petitioner City of Everett's ("Everett") objection

to the District Court's jury instruction on causation was not preserved for review. This argument is patently false.[1]

At trial, counsel for Everett clearly and distinctly brought the problem with the causation instruction to the attention of the Trial Judge. Prior to the time that the jury retired, at a sidebar conference after the Court's charge, the following exchange took place between counsel for Everett, Mr. Levy, and the Court:

Mr. Levy:	All right. In several instances, although you did mention the word "moving force" once —
The Court:	Yes.
Mr. Levy:	— on numerous occasions, you said "a cause" —
The Court:	Right.
Mr. Levy:	— an affirmative link, a cause.
The Court:	That's right.
Mr. Levy:	I think where "moving force" means it has to be more than just a contributing cause, it has to be the moving force. If there are five causes to some event, perhaps one of them is the moving force, although they are all causes.
The Court:	Well, I gave it once. I don't have to say it again.
Mr. Levy:	It depends upon what you repeat and what you don't repeat as to what a jury is —

[1] Bordanaro raised this argument to the Court of Appeals. See Brief for Bordanaro to the Court of Appeals, pages 39-40. The Court of Appeals evidently thought so little of the argument that the Court ignored it in its opinion, and proceeded directly to the merits of the jury charge. See Appendix to Petition for Certiorari ("App."), pages A28-A29, *Bordanaro* v. *McLeod*, 871 F.2d 1151, 1165-1166 (1st Cir. 1989).

The Court: True.[2]

This exchange at sidebar satisfied all of the elements of Fed. R. Civ. P. 51. First, counsel for Everett specifically directed the attention of the Court to the problem language in the charge. Counsel clearly pointed out to the Court that its use of the terms "a cause" and "an affirmative link" could be taken by the jury to mean that liability could be found if the policy or custom merely contributed to the ultimate harm. This portion of the objection clearly satisfied the "stating distinctly" requirement of Rule 51. See e.g. *Memphis Community School District* v. *Stachura*, 477 U.S. 299, 304-305 n.6 (1986).

Second, counsel succinctly set forth the grounds for the objection. Counsel pointed out to the Court that the concept of "moving force" meant more than simply having a causal connection to the ultimate injury, and that this requirement imposed a more strict standard of causation. This exchange satisfied the purpose of Rule 51 that the Trial Judge be apprised of the objection so that he would have the opportunity to correct the erroneous instruction. See e.g. *Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943).

In short, Bordanaro's claim that Everett did not preserve its objection to the causation instruction is specious. As is clear from the record, Everett lodged a sufficient objection to the instruction to preserve the issue for consideration by this Court.

II. Bordanaro Distorted the Evidence in the Record of Everett's Alleged Custom of Breaking Down Doors to Effect Felony Arrests and Prior Incidents of Police Misconduct.

In two critical areas in the brief in opposition, Bordanaro's hyperbole went well beyond the factual evidence contained in

[2] See Trial Transcript, Volume 16, pages 37-38.

the record in this matter. The effect of these distortions, left uncorrected, could be to mislead this Court as to the basis for the Court of Appeals' decision.

First, Bordanaro suggested that there was some evidence in the record in police reports sent to the Chief for his review of Everett's alleged unconstitutional "custom" of breaking down doors to effect felony arrests. See brief in opposition, page 9. To the contrary, there were no such reports introduced into evidence. Instead, the Court of Appeals held that the custom existed based solely upon the testimony of Sgt. Ferullo and the inferences that could be drawn from the King Arthur incident itself. See App. A9-A10, *Bordanaro*, *supra*, 871 F.2d at 1156-1157.

As a result, the Court of Appeals fashioned Everett's liability based upon the "custom" utilizing a set of assumptions. The Court *assumed* that the practice of breaking down doors to effect felony arrests continued notwithstanding an intervening change in state law; it *assumed* that details of such forced entries were written down in police reports; and it *assumed* that such reports were actually forwarded to the Chief for his review. Liability based upon such assumptions is vicarious, at best.

Second, Bordanaro asserted that the testimony of Sgt. Ferullo and the expert on police practices provided evidence "that the Everett Police so often violated constitutional rights" that the need for additional training was obvious. See brief in opposition, page 14. The suggestion that there was any evidence of other constitutional violations was false. Instead, as the Court of Appeals acknowledged, Bordanaro failed to introduce any other instance of police misconduct prior to the King Arthur incident itself. See App. A16-A19, *Bordanaro*, *supra*, 871 F.2d at 1159-1161. Liability in this case was based solely upon "direct evidence" of police inadequacies, along with inferences drawn from the incident itself. See App. A10, A19,

Bordanaro, supra, 871 F.2d at 1156-1157, 1161. The Court of Appeals' analysis in this area, too, created a form of vicarious liability for Everett.

Notwithstanding the suggestions of Bordanaro, the record in this case contained no evidence of other incidents of police misconduct. Questions two and three in the petition therefore accurately set forth the issues of causation and fault in a case, such as this one, where there were no prior violations to warn officials of the problem.

Conclusion.

For all of the foregoing reasons, Petitioners City of Everett, et al., maintain that the issues in this case have been properly preserved for review as set forth in their petition. Accordingly, petitioners respectfully request this Court to grant the relief requested in their petition.

Respectfully submitted,

IRA H. ZALEZNIK,*
LEWIN & ROSENTHAL,
The Pilot House,
Lewis Wharf,
Boston, Massachusetts 02110.
(617) 227-9400

**Counsel of Record*